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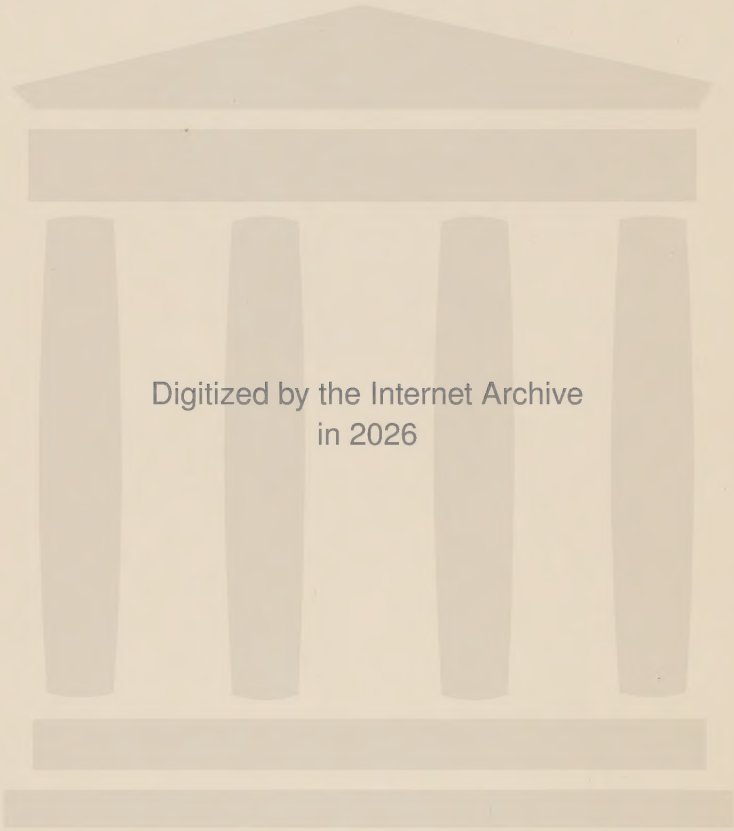

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PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[ADMIRALTY.]

H.M.S. ARCHER.

1918
November 4.

[1918. fol. 824.]

Admiralty—Limitation of Actions—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, c. 57), *ss.* 8, 9—*Ex parte Applications for Extension of Time—Practice—Discretionary Powers—Application to King's Ships—"Rules of Court."*

Sect. 8 of the Maritime Conventions Act, 1911, provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of any damage to another vessel unless the proceedings are commenced within two years from the date when the damage was caused; but the Court "may, in accordance with the rules of court," extend the period to such extent and on such conditions as it thinks fit. By s. 9 the Act is made applicable to any persons other than the owners responsible for the fault of the vessel.

On January 18, 1915, a collision occurred in the North Sea between the plaintiff's vessel, a Dutch trawler, and H.M.S. *Archer*. Diplomatic correspondence ensued, and on July 14, 1916, the British Consul-General in Rotterdam informed the plaintiff that the Admiralty would not admit liability. The plaintiff continued to make diplomatic representations,

1918

H.M.S. ARCHER.

and on February 21, 1918, was informed through the Dutch Minister that the Foreign Office could not reopen the matter.

On October 21, 1918, an application was made ex parte to Hill J. in chambers for leave to commence proceedings against the officer commanding the *Archer*, notwithstanding that the period of two years had elapsed. His Lordship granted leave. Thereupon the defendant applied to set aside the order on the grounds (*a*) that the Court had no power to deal with the matter ex parte; (*b*) that no rules of court had been made under the Act, and therefore that the second part of s. 8 was inoperative; and (*c*) that if the Court had power to exercise its discretion, on the facts it ought not to have been exercised :—

Held, (i.) That, whether or not the application should have been dealt with ex parte, the Court had power to review its order; (ii.) that by virtue of s. 9, sub-s. 4, the Act applied to actions brought against the responsible officer of a King's ship; (iii.) that although there were no rules of court made under the Act the Court had power to exercise its discretion under s. 8; but that (iv.), having regard to the delay in making the application after February 21, the latest date on which it might be urged in the plaintiff's favour that the case was still under consideration, the Court ought not to exercise its discretion, and that the order obtained ex parte must be set aside.

MOTION to set aside an order obtained ex parte, giving the plaintiff leave to commence proceedings.

The plaintiff was the owner of the Dutch trawler *Neeltje Catharina*, the defendant was Commander Raymond J. Harris St. John, R.N., the officer commanding His Majesty's ship *Archer*.

On January 18, 1915, a collision occurred between the two vessels in the North Sea. On September 24, 1915, the plaintiff wrote to the British Consul-General in Holland to know whether the Admiralty would admit liability. Some correspondence ensued, and on July 14, 1916, the Consul-General informed the plaintiff that the Admiralty declined to admit liability. Further letters were exchanged; and on February 21, 1918, the Dutch Minister wrote to the plaintiff informing him that the British Foreign Office had stated that they declined to reopen the question, and that the plaintiff always had his legal remedy. On June 18, 1918, the plaintiff's solicitors wrote to the Treasury Solicitor stating that they had been instructed to issue a writ against the officer in charge of H.M.S. *Archer*, and the Treasury Solicitor not consenting to waive the question of the delay in commencing proceedings,

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H.M.S. ARCHER.

the plaintiff's solicitors obtained an affidavit from the plaintiff, setting out the reason for the delay—viz., the desire to avoid a law suit and the diplomatic negotiations which had taken place—and on October 21, 1918, applied ex parte to Hill J. in chambers for an extension of time under s. 8 of the Maritime Conventions Act, 1911. (1) His Lordship made the order, and a writ was then issued. The Treasury Solicitor entered appearance under protest, and the present application asking that the order be rescinded and the writ set aside was then set down.

November 4. *C. R. Dunlop* for the defendant. The Court has no power on an ex parte application to make an order giving the applicant leave to proceed. Notice should be given to all persons affected by the application. Further, no rules of court having been made under the Act, the Court has no power to grant an extension of time under the section.

[HILL J. referred to *The James Westoll*. (2)]

The point was not raised in that case, and it is no authority against the contention, because, on the merits, the Court of Appeal refused the application for leave to bring the action.

On the facts the plaintiff has failed to show any circumstances entitling him to ask for the indulgence of the Court. He preferred diplomatic to legal action, and having chosen his forum, must be bound by the terms of the Act, which was passed in order to apply the procedure of continental

(1) Sect. 8: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight . . . . caused by the fault of the former vessel . . . . unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused.

. . . .

"Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the Court . . . . extend any such period to an extent sufficient to give such reasonable opportunity."

Sect. 9 (4): "This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression 'owners' included such persons. . . . ."

(2) (1913) *Shipping Gazette*, Nov. 6

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countries, including Holland, to actions in Great Britain. The impossibility of tracing the various witnesses of a collision which occurred nearly four years ago must also be borne in mind in considering the question of the exercise of discretion.

Noad for the plaintiff. Applications under s. 8 appear to have been made both ex parte and with notice. It has never been suggested that the Court has no jurisdiction to exercise its powers under the section. "The rules of court" referred to are the rules of the Supreme Court; but if special rules to be made under the Act are intended, in their absence the Court would be guided by the rules of the Supreme Court. It was not contemplated that the section would apply to King's ships, as to which there never could be any opportunity for arrest. The Court, therefore, on general principles should give the plaintiff every opportunity of maintaining his action. He was quite entitled to get the matter settled by diplomatic action if he could, and after that failed there has been no such delay as to disentitle him to maintain an action at law. Having regard to the war and the difficulties of communication, the application for leave to proceed was made within a reasonable time.

HILL J. This matter comes before me on a motion to set aside an order which I made ex parte, on the application of the plaintiff for an extension of time, under s. 8 of the Maritime Conventions Act, 1911, for bringing an action against the commanding officer of H.M.S. *Archer*, which is said to have come into collision with the plaintiff's trawler on January 18, 1915.

It is now submitted by counsel for the defendant that I had no power to deal with the matter ex parte. It is possible that that is so, but it is unnecessary to go into that now. If it was not properly dealt with ex parte in the first instance, I have not the slightest doubt that I have power to review on application, and both parties have agreed that all the matters at issue are before me for my consideration to-day. It may be that in the future definite procedure should be

established for making applications under this section, but up to now no rules of this court have been made, and matters have been dealt with for some time both on notice and also upon ex parte applications, with the right for the defendant to come afterwards and argue that the order should be set aside. Both parties are now before the Court, and I have to consider whether the plaintiff should have an order extending the period for bringing this action.

Having regard to the language of s. 9, sub-s. 4 of the Act, I think s. 8 extends to any action brought against a commanding officer of a King's ship. The proviso to s. 8 appears to me to deal with this particular matter. It gives the Court a discretion in all cases, except that in the second part it provides that time *shall* be given with certain limitations. That second part, the compulsory part, of the proviso has no application to the present case, because a King's ship cannot be arrested. There is no maritime law under which its owner is liable.

It is clear that the power to be exercised must be exercised if the Court is satisfied that there has not—during the two years—been a reasonable opportunity of arresting the vessel. Here there never was any power of arresting the vessel. Therefore in the present case the question whether the limitation of two years is to be extended depends on the discretion of the judge on such conditions as the Court may think fit, and the words are "in accordance with the rules of court." No rules of court have been made, and counsel for the defendant argued that it followed that that part of the proviso is inoperative. I do not understand that that is so, and in *The James Westoll* (1) an application for an extension of time under this proviso was discussed in the Court of Appeal, and it is clear nobody ever suggested that the Court could not exercise its discretion under the first part of the proviso. I think there is power to exercise discretion, subject, however, to the consideration that the Act confers the right of which the defendant cannot be deprived, that, unless sufficient reason is shown, the plaintiff

(1) (1913) *Shipping Gazette*, Nov. 6.

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Hill J.

should not be entitled to bring his action after the period of two years.

Now that I have had the matter fully argued by counsel on both sides, and having considered the affidavit before me, I am satisfied that the discretion ought not to have been exercised and the order made. The highest the plaintiff can put it is that he was lulled into not bringing his action because of the negotiations between his Government and the British Government. It is established that these negotiations were going on beyond 1915. But assuming in the plaintiff's favour that the British Government were considering the matter, it cannot be put more favourably than that this continued up to February 21 last, when it was clearly brought to the plaintiff's notice that the British Government would not admit any claim, and the statement was repeated that it was always open to the plaintiff to bring his action.

The application to extend the time was not made until October 21, and that delay seems to me to be devoid of excuse. I do not think, therefore, that the Court ought to exercise its discretion in this case, and the order which I made ex parte must be set aside with costs.

Solicitors for plaintiff: *Botterell & Roche.*
Solicitor for defendant: *The Treasury Solicitor.*

E. C. T

[PROBATE.]

Applied. IN THE GOODS OF SPICER DECD. [1949] P. 441

In re STABLE, DECEASED.

1918
October 25, November 8.

DALRYMPLE v. CAMPBELL.

Soldier's Will—Testamentary Intention—Nuncupatory Will—Knowledge of Power to make a Soldier's Will—Deliberate Expression of Wish as to Disposition of Property after Death—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11.

It is not necessary for the validity of a soldier's nuncupatory will to prove that he knew he was making a will, or that he had the power to make a will while a minor or by word of mouth. It is enough if he intended deliberately to give expression to his wishes as to the disposition of his property in the event of his death.

THE deceased, Lieutenant Stable, a minor, who was at Sandhurst training for the Army, shortly before June, 1917, became engaged to marry the plaintiff, Blanche M. Dalrymple. He had consulted his family solicitor, who was also his friend, as to his position with regard to property, and had been advised that he would not come into possession of anything till he attained 21, and could not make a will before that date. The deceased went to France towards the end of July, and was killed in action on October 9, 1917.

The plaintiff brought this action for probate of a nuncupatory will in her favour. She gave evidence that on June 22, 1917, the deceased said to her: "If anything happens to me, and I stop a bullet, everything of mine will be yours"; and again, on July 6, when they were calling together on a Miss T., the deceased said to her: "If I stop a bullet everything of mine will be yours." Miss T. corroborated the plaintiff's statement as to the words used on the second occasion. When the plaintiff and deceased had left Miss T.'s house she said to him: "I wish you would not speak of such things to outside people"; and he replied: "Well, you see, if anything happens to me, and there is a row, Miss T. will be able to back you up." On August 9 he wrote to the plaintiff a letter containing the following passage: "As regards me, you know all will be yours when we are married. . . . . So, supposing, I hate saying so, as I know far too well I shall get killed; but in an extreme case, darling, it will be yours a little sooner perhaps."

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STABLE, Deceased, *In re.* DALRYMPLE *v.* CAMPBELL.

There was some question at the hearing at what time the deceased received orders to join the Army in France, but before judgment was delivered the order was proved to have been received on June 30, and it was admitted that from that date the deceased was on military service within the meaning of the Wills Act, 1837, s. 11.

Bayford (*Sir Ernest Pollock, K.C.* with him) for the plaintiff. The facts show a clear intention that the property of the deceased should go to the plaintiff. The defendants contend there is no evidence that the deceased thought at the time he spoke he was making a will. That is not necessary.

In *In the Estate of Eric Donner* (1) your Lordship held that words used by a deceased as a reason for not making a will, because he had been told erroneously that his property would go as he wished it, and he did not make a will, could not be treated as a will, but that is quite a different case.

Sir W. E. Hume-Williams, K.C. and *Stuart Bevan* for the next of kin. The whole reason for giving soldiers a special power of making wills without the usual legal forms is that they have usually no facilities for getting legal assistance. In this case the deceased not only could easily have got legal advice, but he had actually done so, and was advised that he could not make any will before he was 21, and would not have anything to leave before he reached that age. After that advice he could not have supposed he was making a will on any of the occasions relied on. The true meaning of the words used is that he was speaking of what he would do when he was married and had attained 21. They referred to *In the Goods of Hiscock.* (2)

Cur. adv. vult.

November 8. HORRIDGE J., after stating the facts, continued: It has now been proved before me the deceased received his orders to leave for France on June 30, 1917, and it was not disputed he would be, from the time of receiving such notice, a soldier in actual military service for the purpose of s. 11 of the Wills Act, 1837.

(1) (1917 62 Sol. J. 161. (2) [1901] P. 78.

The plaintiff alleges that on two occasions the deceased made statements which she contends amount, in effect, to a soldier's will. [His Lordship stated the words used by the deceased on June 22 and July 6.] This conversation of July 6 was corroborated by the evidence of Miss T., and was referred to in a conversation between the plaintiff and the deceased after they had left Miss T.'s house.

In my view it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will, or had the power to make a will by word of mouth. The statement made by the deceased man must, I think, be meant for a will, only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death.

The conversation which took place after leaving Miss T.'s shows that the expressions which he had previously made in Miss T.'s presence were not made at random, but deliberately.

I regard the letter of August 9 as not being in itself a will, but as forming strong corroborative evidence of his having previously expressed his wishes on July 6. [His Lordship read the passage above set out.]

On behalf of the defendants it was contended that, inasmuch as he knew from the conversations he had with his solicitor that he would not be entitled to receive his property until he was 21, he never intended to dispose of it. This argument does not appeal to me, as he had a vested interest in the property, which he could dispose of if he wished.

I think the expression, "If I stop a bullet everything of mine will be yours," used by him on July 6, constitutes a good will, and I pronounce for probate of the will in these words, as I accept the plaintiff's and Miss T.'s evidence that this was the expression he used.

Solicitors for plaintiff: *Bircham & Co.*

Solicitors for defendants: *Biddle, Thorne, Welsford & Sidgwick.*

J. R. B.

PROBATE.

1918
Nov. 23.

In the Estate of J. B. POOLE (DECEASED).
POOLE *v.* POOLE.

Practice—Will—Execution of Power of Appointment—Subsequent Marriage—Revocation—Appointment making appointed Fund liable for Debts—Administration with Will annexed so far as it related to Appointment—Administration to Widow in Preference to Appointee who was Next of Kin—Form of Order—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 18.

P. made a will which exercised a general power of appointment in favour of his son, but in such a manner as to make the appointed fund part of his estate for payment of debts, and also disposed of his general estate. He afterwards married and died without having made a fresh will. It was admitted that by virtue of the Wills Act, 1837, s. 18, the will was revoked as to general estate, but was not revoked so far as it was an exercise of the power. The testator's son was a person of unsound mind not so found, and a receiver of his estate had been appointed in Lunacy. This action was brought by the testator's widow, claiming administration. The son, who was his sole next of kin, was made defendant and appeared by the receiver. The receiver claimed that the administration should be granted to him for the use of the son:—

Held, that the grant must be made to the widow, but must be a general grant of administration with so much only of the will annexed as related to the appointed fund, not a grant of administration limited to the appointed fund. The costs of all parties were ordered to be paid out of the whole estate, including the appointed fund.

J. B. POOLE by his will, dated October 21, 1902, gave all his residuary estate, including the legacy bequeathed to him by the will of Frances Grant, to a trustee upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to invest the residue and stand possessed of the investments and the income thereof upon trust for his only son if and when he should attain the age of 21 years or marry, absolutely; and if he should die under that age and unmarried in trust for Mrs. E. Wadeson, who was the sister of the testator's late wife, absolutely.

The legacy referred to was a gift of 8000*l.* in trust to apply the income for the testator's benefit during his life, with a general power for the testator to appoint 4000*l.* thereof by will.

1918

J. B. Poole, *In the Estate of.* Poole *v.* Poole.

The testator was a widower at the date of his will, but on December 28, 1916, he married the plaintiff. He died on July 25, 1917, leaving the plaintiff him surviving.

The son mentioned in the testator's will had attained 21 in the testator's lifetime, but had after attaining that age become of unsound mind, not so found, and had for about two years before the testator's death been detained in the County Asylum at Denbigh.

After the testator's death Mrs. Wadeson, who claimed to be the only next of kin of the testator's son, procured the appointment of her own son-in-law as receiver in Lunacy of the estate of the testator's son. She claimed to be a creditor of the testator's estate for 1000*l.* in respect of a policy for that amount upon the testator's life which she alleged he had given to her and covenanted to pay the premiums, but had failed to do so. There was a similar claim against the testator's estate by a Mrs. Sale in respect of a policy for 500*l.*

This action was brought by the testator's widow asking for administration of the testator's estate with the will annexed so far only as it related to the power of appointment. The testator's son was made defendant and appeared by the receiver.

It was admitted that the will was revoked by the testator's second marriage, except so far as it was an exercise of the power, and was preserved by s. 18 of the Wills Act, 1837, so far as it was an appointment.

It was stated that the testator's general personal estate was of the value of 1300*l.* His debts, apart from the claims on the policies, were 460*l.* The appointed fund was 4000*l.* and the testator's real estate was worth 2000*l.*

Priestley K.C. and *Grazebrook* for the plaintiff. It is admitted that the testator's will was revoked by his second marriage, except so far as it was an exercise of the power of appointment given to him by Mrs. Grant's will. The power was general, and the testator made the appointed fund part of his estate for the payment of his debts. The grant of administration must be general with the will annexed only

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J. B. POOLE, *In the Estate of* POOLE *v.* POOLE.

so far as it refers to the appointed fund. The Court always prefers the widow unless there is a special reason against her : Wiliams on Executors, 9th ed., p. 354.

In this case the defendant, who claims the grant, is the nominee of Mrs. Wadeson, whose claim against the estate needs to be specially scrutinized. The Court regards the fact that one of the next of kin is a creditor a reason against making the grant in her favour : *Webb* v. *Needham.* (1)

Le Bas (*Hume-Williams K.C.* with him) for the defendant. In the whole estate the interest of the next of kin is much the larger and the grant ought to be made to the defendant for the use of the son. In *In the Goods of McVicar* (2), which was a similar case, the grant was made to the next of kin. The grant of administration must in any case be limited to the property over which the power extended : *In the Goods of Russell.* (3) As to the objection that the receiver is the nominee of Mrs. Wadeson, the receiver can only act under the supervision of the Master in Lunacy who will check him in everything.

Priestley K.C. in reply. The authority of the Master in Lunacy only arises when the property is found to belong to the person of unsound mind. Until it is so found the receiver will have all the powers of an administrator.

HILL J. This case relates to the will, made in 1902, of a testator who died in July, 1917, having married a second time in the previous December. It is admitted that his will was revoked by this marriage except so far as it consisted of an appointment in exercise of a power possessed by the testator, but was not revoked so far as it related to that appointment. There is no dispute about that. The only question is who is to be appointed administrator. The contest is between the widow and a person who has been appointed receiver in Lunacy of the property of the testator's son by a previous marriage. He is also the son-in-law of a lady who has made a claim of 1000*l.* against the testator's estate. If this claim and another of

(1) (1823) 1 Add. 494. (2) (1869) L. R. 1 P. & M. 671.
(3) (1890) 15 P. D. 111.

a similar character are good, they will exhaust all the free personal estate of the testator, and no one will get anything except the person who takes under the appointment. On the other hand if they fail the widow would take about 800*l.* The appointed fund as well as the general personal estate is made subject to the payment of the testator's debts. It is therefore of great importance that these claims should be strictly scrutinized. Under these circumstances it is contended that the widow ought to be appointed administratrix of the general personal estate.

On the other hand, it is said that the receiver has an absolute right to a grant of administration at least so far as relates to what passed under the appointment.

It would be most inconvenient to make separate grants as to the two parts of the estate, and I should not take that course unless I were forced to do so, which I am not. The only question therefore is to which of these persons should the grant be made. There is something to be said in favour of each, but on the whole I think the grant must be made to the widow.

Priestley K.C. Then it will be a general grant of administration with so much only of the will annexed as relates to the appointed fund. I submit that the defendant's costs should be paid out of the appointed fund and the plaintiff's costs out of the whole estate including that fund.

HILL J. The form of grant must be in the form you ask. But the costs of both parties must be paid out of the whole estate including the appointed fund. That will throw the burden of costs upon each party in proportion to his or her interest.

Solicitors for plaintiff: *Ridsdale & Son, for Cornish & Forfar, Liverpool.*

Solicitors for defendant: *Field, Roscoe & Co., for Oliver Jones, Billson & Co., Liverpool.*

J. R. B.

PROBATE.

1918
Nov. 13, 14, 15, 25.

In the Estate of BARLOW (DECEASED).

HAYDON *v.* PRING.

Probate — Practice — Costs — Discretion — Jurisdiction — Co-plaintiffs Executors propounding Will—Costs of One Co-plaintiff ordered to be paid out of Testatrix's Estate—The other Co-plaintiff ordered to pay Defendant's Costs of Action—Defendant's Costs of Action to include Costs ordered to be paid out of Estate to first Co-plaintiff—Judicature Act, 1890 (53 & 54 *Vict.* c. 44), *s.* 5—*Rules of the Supreme Court, Order* LXV., *r.* 1.

In an action in the Probate Division the Court has jurisdiction, under the Judicature Act, 1890, s. 5, and Rules of the Supreme Court, Order LXV., r. 1, to order that the costs of one of two co-plaintiffs (being executors propounding a will) shall be paid out of the testatrix's estate, and that the other co-plaintiff shall pay to the defendant the costs of the action, including the costs ordered to be paid to his co-plaintiff out of the testatrix's estate which the defendant represents.

IN this action the two co-plaintiffs, a doctor and solicitor, propounded, as executors, a will dated April 30, 1917, with a codicil. The defendant, who was the executor of and a beneficiary under an earlier will, pleaded that the propounded will and codicil, (1.) were not duly executed; (2.) that the testatrix was not of sound mind at the time of execution; (3.) that she did not approve the contents; (4.) that the execution of the said will and codicil was obtained by the undue influence of the doctor plaintiff and a nurse, who both benefited largely under the will.

After three days' trial the judge decided against the defendant on the first three pleas, but in his favour on the plea of undue influence. The will and codicil propounded were pronounced against and the earlier will established.

The judge also found that the plaintiff, Haydon, the solicitor, had acted throughout with care and propriety, and that he was bound to propound the will of which he was one of the executors; but he reserved the question of costs.

Holman Gregory K.C. and *Cotes-Preedy*, for the plaintiffs.

Rigby Swift K.C. and *Latham* (*Darnley Clifton* with them) for the defendant.

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BARLOW, *In the Estate of.* HAYDON *v.* PRING.

Their arguments on the question of costs sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 25. HORRIDGE J. (after stating the facts as above, continued):

In *In re Jeffries, Hill* v. *Jeffries* (1) Lord Cozens-Hardy M.R. says: "But it was said that there was a rule in Probate that a person who as an executor propounded a document which he failed to establish could not be ordered to pay costs unless he had been guilty of some breach of duty. There was nothing in the authorities cited which tended to support such a proposition. The present was not a case where the document put forward was a genuine will, so far as signature and witnesses were concerned, but where at the trial it was proved that the testator was non compos mentis when he executed it; in a case such as that the executor might get his costs." Having regard to the view which I took of Mr. Haydon's conduct I feel he ought to have his costs paid out of the estate, but that the plaintiff, W. H. Fawcett, ought to pay the defendant's costs of the action.

I was asked by counsel for the defendant to say that in the costs to be paid by the plaintiff, W. H. Fawcett, there should be included the costs which I have awarded to the plaintiff, Haydon, out of the estate of the deceased. If I have power to give this direction I shall certainly give it, as I consider that the plaintiff, Fawcett, acting in concert with Miss Wareham, caused the will and codicil propounded by the plaintiffs to come into existence, and threw upon the estate the costs of the litigation.

I cannot find any case where costs awarded against the defendant, or costs awarded against the estate of which the defendant is executor, have been ordered to be paid by a co-plaintiff, but after carefully considering *Sanderson* v. *Blyth Theatre Co.* (2) and *Bullock* v. *London General Omnibus Co.* (3) I have come to the conclusion that the powers conferred by section 5 of the Supreme Court of Judicature Act, 1890,

(1) [1916] W. N. 394; 33 Times L. R. 80, 81.

(2) [1903] 2 K. B. 533, 543.

(3) [1907] 1 K. B. 264.

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Horridge J.

and Order LXV., r. 1, of the Rules of the Supreme Court, give me an absolute discretion in the matter which I should be wrong if I did not exercise in this case. In the latter case Collins M.R. at p. 270 quotes the language of Stirling L.J. in *Sanderson* v. *Blyth Theatre Co.* (1) when he says : " I think that the term ' costs ' in s. 5 of the Judicature Act, 1890, ought to be read as including costs which a particular party may be ordered to pay in the first instance and then to have over against another."

It is quite true that the defendant is not ordered personally to pay costs in this case, but they are given out of an estate of which he is executor and which he represents, and which is diminished by his having to pay such costs.

In *Sanderson* v. *Blyth Theatre Co.* (1) Stirling L.J. says : " It is to be observed that when the Court of Chancery ordered the costs of one defendant to be paid by the plaintiff and added to his own, and the whole to be borne by another defendant, the Court was not giving substantive relief by way of indemnity or damages or otherwise, but was simply exercising its jurisdiction over the costs of a pending suit."

I exercise my discretion by directing that the costs to be paid by the plaintiff, Fawcett, to the defendant, Pring, shall include the costs which I have ordered to be paid to the plaintiff, Haydon, out of the estate of which the defendant, Pring, is executor.

Solicitors for plaintiffs : *Peacock & Goddard,* for *Mooring, Aldridge & Haydon,* Bournemouth.

Solicitors for defendant : *Lewis & Sons.*

(1) [1903] 2 K. B. 533, 543.

J. P. B.

ADMIRALTY.

THE NEPTUNE.

1918
Nov. 4, 25.

[1918, *FOL.* 415.]

Admiralty—Damage by Collision—Counter-Claimants—Practice—Security—Rules of the Supreme Court—Order XIX., *r.* 3—*Admiralty Court Act* 1861 (24 *&* 25 *Vict. c.* 10), *s.* 34.

Under Order XIX., r. 3 the Court may refuse permission to defendants to proceed by counter-claim if of opinion that it cannot be conveniently disposed of or "ought not to be allowed." By s. 34 of the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10): "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal and the cross-cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause."

The plaintiffs' and defendants' vessels came into collision and both received damage. The plaintiffs brought an action in rem against the defendants, "the owners of the steamship *Neptune*." The defendants counter-claimed, and applied to the plaintiffs for security to answer the counter-claim. Security was given, but on the plaintiff making a similar application the defendants refused to give security on the ground that the *Neptune* was owned by the French Government, and was not subject to arrest:—

Held, that the Court had no power to order security to be given or, in default thereof, to stay the defendants' counter-claim.

APPEAL SUMMONS (adjourned into Court) by plaintiffs in an action of damage by collision against the refusal of the Assistant-Registrar to order the defendants to give security.

The plaintiffs were the owners of the steamship *Hampshire;* the defendants were "the owners of the steamship *Neptune*." The collision occurred in Plymouth Sound on April 17, 1918, and both vessels received damage. On April 29 the plaintiffs issued a writ in rem, and on July 19 filed their claim. On July 31 the defendants filed a defence and counter-claim. Correspondence then took place between the respective

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solicitors with regard to bail, and on September 2 the plaintiffs gave bail in the sum of 1500*l*. From an affidavit filed on behalf of the defendants it appeared, however, that the *Neptune* was a German vessel seized as prize in a French port on the outbreak of war, and owned by the French Government, a fact unknown to the underwriters' representatives, who had instructed the defendants' solicitors to enter appearance and deliver a defence and counter-claim under the belief that the vessel was owned by a firm of French shipowners; whereas, in fact, this firm merely managed the vessel on behalf of the French Government. The plaintiffs' application for bail to answer the claim was therefore refused, on the ground that the *Neptune* was not subject to arrest. The plaintiffs thereupon took out a summons for an order that the defendants should give bail in the sum of 5000*l*. The Assistant-Registrar dismissed the summons, and the plaintiffs appealed.

Balloch for the plaintiffs. In *The Rougemont* (1) it was held that there was no power to make a defendant give security under s. 34 of the Admiralty Court Act, 1861, but that was a case of an action in personam where the defendants' vessel had sank, and the plaintiffs, therefore, when they chose to bring their action, knew that they could never have the security of the vessel. Different considerations arise in an action in rem. The defendants' vessel is subject to the jurisdiction of the Court, and in the present case, by appearing to the writ and counter-claiming, the defendants, be they underwriters or the French Government, have submitted to the jurisdiction, and cannot be heard to say that they cannot be impleaded. It would be inequitable to allow the counter-claim to be proceeded with unless the defendants give security to answer the claim. The procedure by way of counter claim, instead of cross-action, is a creature of the Judicature Acts, and is machinery only; it does not alter the rights of the parties. It was not intended that the procedure by way of counter-claim should avoid the provisions of the Admiralty Court Act, 1861, as regards giving security. If

(1) [1893] P. 275.

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the defendants had had to bring a separate action they could have been made plaintiffs when the actions came to be consolidated, and in that event s. 34 of the Admiralty Court Act would apply. The application, however, is really based on Order XIX., r. 3, under which the Court can refuse permission to defendants to proceed with their counter-claim if of opinion that it ought not to be allowed, and it is submitted that under this rule the counter-claim should be stayed until security is given.

Dunlop for the defendants. The *Neptune* is owned by the French Government, and is not subject to arrest. The application in substance, therefore, is to exclude the counter-claim unless the defendants do something which no Court can compel them to do. Under Order XIX., r. 3 the Court has power to stay a counter-claim "if it ought not to be allowed," a limitation which is confined to cases in which no cause of action is disclosed or the counter-claim is scandalous or an abuse of the process of the Court. If the counter-claim in itself is unobjectionable the Court has no power to strike it out or to grant a stay. See also Order XIX., r. 27 as to "embarrassment," and *The Cheapside*. (1) The only other right to a stay is that provided by s. 34 of the Admiralty Court Act, 1861; but that is limited to cross-actions and the principal action, i.e., the plaintiffs', can alone be stayed: *The Rougemont*. (2) In the present case no cross-action was instituted. A defendant who puts in a counter-claim is not a plaintiff, and a counter-claim is not an action within s. 100 of the Judicature Act, 1873: *Lord Kinnaird* v. *Field*. (3)

HILL J. This is a summons in an action arising out of a collision between the British steamship *Hampshire* and the steamship *Neptune*. The plaintiffs are the owners of the *Hampshire*, and the defendants, who are counter-claimants, are described in the writ as the owners of the *Neptune*. Neither vessel has been arrested. There was correspondence between the solicitors, in which it was stated that the *Neptune* was

(1) [1904] P. 339. (2) [1893] P. 275.
(3) [1905] 2 Ch. 361, 370.

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under requisition to the French Government; but, whatever the position of the *Neptune*, the *Hampshire* was liable to arrest; and on September 3 the plaintiffs gave bail in the sum of 1500*l.*

It is now stated in an affidavit filed on behalf of the defendants that the *Neptune* was a German ship seized as prize and owned by the French Government, and that at the time of the collision she was, and still is, in the public service in connection with the conduct of the war. It also appears that she was insured and that the instructions to enter appearance were given by the underwriters.

By the present summons the plaintiffs ask that the defendants be ordered to give bail in the sum of 5000*l.* to answer the claim. The Assistant-Registrar refused to make the order, and the plaintiffs have appealed. The form of the application in any case is not in order; the Court has no power to compel bail to be given. At the most, in a proper case, the Court can either order the arrest of the ship or grant a stay until bail is given. The contention of the plaintiffs is that the Court has power to, and should, stay the counter-claim under the rules of the Supreme Court until bail is given.

There is no question that the counter-claim can be conveniently disposed of in the pending action. Claim and counter-claim arise out of the same collision, and if separate writs had been issued the actions would have been consolidated and an order made that they should be tried together. In my opinion the Court has no power to exclude a counter-claim which in itself is proper to be tried, because the plaintiffs have had to give security and the defendants have not. I regret the want of mutuality as regards bail; but if the French Government are really the owners of the *Neptune* I have no doubt they will promptly pay any damages that may be found due to the plaintiffs. I had hoped that, as the appearance had really been entered on the instructions of underwriters, arrangements would have been made by the underwriters to give security. I much regret that they have not done so, but I have to decide the case according to the legal rights of the parties, and I am unable to find

that the plaintiffs have any legal right to ask the Court to stay the counter-claim. The appeal must, therefore, be dismissed. (1)

Solicitor for plaintiffs: *Charles E. Harvey.*

Solicitors for defendants: *Stokes & Stokes.*

(1) NOTE.—On December 20, 1918 a summons taken out by the plaintiffs came before HILL J. for an order "that the appearance entered in the action by Messrs. Stokes & Stokes on behalf of 'the owners of the *Neptune*,' having been entered by them without such owners' authority, the same and all proceedings thereafter be set aside, and that Messrs Stokes & Stokes may be condemned in and ordered to pay to the plaintiffs their costs incurred in consequence of such appearance."

In making the order HILL J. said that he had no doubt that Messrs. Stokes & Stokes believed thay had authority because they had received instructions from the underwriters' representatives, Messrs. W. K. Webster & Co., and he had also no doubt that the latter believed they had authority because they had received instructions from the underwriters. There had really been a chain of warranties of authority, and the damages which Messrs. Stokes & Stokes would have to pay, namely, the costs incurred by the plaintiffs in consequence of the entering of the appearance, would be passed on to Messrs. W. K. Webster & Co., who possibly would pass them on to the underwriters. The appearance clearly was entered without authority and would be set aside, but he would not set aside the writ or the service of the writ, as he had not the French Government before him.

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Nov. 27, 28, 29;
Dec. 2, 5.

[IN THE COURT OF APPEAL.]

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[1917, *FOL.* 199.]

Admiralty—Demurrage—Custom of the Port of Hull—Discharge of Steamships laden with Wood Cargoes—Duties of Charterers and Receivers.

The defendants, three separate firms of Hull timber merchants, were sued in the Hull County Court for demurrage as indorsees of bills of lading for parcels of a wood cargo carried in the plaintiff's steamship to Hull. The bills of lading incorporated the terms of the charterparty, which provided that the vessel was to be discharged with customary steamship dispatch as fast as she could deliver, but according to the custom of the port. The plaintiff alleged that by the custom of the port, embodied in a printed document headed "Statement of Custom and Practice," which was drawn up in 1899, receivers of wood cargoes were under an absolute obligation to provide clear quay space for unloading or a continuous supply of bogies, so that, on the arrival of the vessel in dock, she could be forthwith discharged at her full rate of discharge.

The county court judge found that, having regard to the congested state of the port and the insufficient supply of bogies, which were under the control of the railway company, the vessel had been discharged as soon as possible, and that no custom had been established by which charterers or receivers were under the alleged absolute obligation. On appeal, the Divisional Court (Horridge and Hill JJ.) entered judgment for the plaintiff, on the ground that it was admitted that the printed customs were applicable so far as they extended, and that the custom as against a single receiver had already been found by Bray J. in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1908) 14 Com. Cas. 1. The defendants appealed:—

Held, reversing the decision of the Divisional Court, that whether the alleged custom did or did not exist was a question of fact; that on the evidence the plaintiff had not established it; and that the charterparty should be construed merely as a customary dispatch charter under which the receivers were not liable for delay beyond their control. Further (per Swinfen Eady M.R.), that, even assuming the custom had been proved, inasmuch as the effect of it would be to impose an obligation upon receivers for delay which they could not prevent, the question would have arisen whether the custom was reasonable; and (per Duke L.J.) that if the charterparty referred to the custom found by Bray J. it was repugnant to the written documents.

APPEAL from a judgment of Horridge and Hill JJ., sitting as a Divisional Court in Admiralty.

The plaintiff, C. A. Van Liewen, was the owner of the Swedish steamship the *Lizzie;* the defendants, Hollis Brothers & Co., Ltd., Smith Brothers, and Smart & Elsom three separate firms of Hull timber merchants, were indorsees of bills of lading for separate parcels of a wood cargo carried by the *Lizzie* to Hull in October, 1915. Under the bills of lading, which incorporated the terms of the charterparty, the cargo was deliverable to the order of the charterers (who were the shippers of the cargo) or their assigns. The charterparty provided that the cargo was to be discharged with customary steamship dispatch as fast as the steamer could deliver, but according to the custom of the port. Should the steamer be detained beyond the time stipulated, demurrage should be paid at the rate of 25*l.* a day. The action was brought in the Hull County Court for eleven days' demurrage under an alleged custom of the port of Hull by which receivers of wood cargoes are under an absolute obligation to provide clear quay space for unloading, or a continuous supply of bogies into which the cargo can be unloaded on or before the arrival of the steamer in dock, so that she can be forthwith unloaded at her full rate of discharge. In order to prove the custom, the plaintiff produced a document headed "Statement of Custom and Practice concerning the Discharge of Steam Ships laden with Wood Cargoes at the Port of Kingston-upon-Hull," drawn up in 1899, and agreed between representatives of the Timber Trade Federation and of the Documentary Committee of the Chamber of Shipping.

The material clauses were as follows:—

"Place of Discharge.—When a wood-laden steamship is chartered for the port of Hull simply and without prescribing any particular dock for discharge, the receiver has the right to order her on or before arrival to any fit and available dock to discharge, which she can forthwith enter and deliver her cargo. It is the practice for such orders to meet the steamer on arrival to prevent delay in docking.

"When a wood-laden steamship is chartered for a particular and named dock in the port of Hull, she shall proceed to such dock, and must in case of need wait until the tide permits

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her to enter the same. The steamer has liberty to lighten at her own expense to enable her to dock more promptly.

"Discharging Berth.—It is the duty of the receiver of a wood cargo at Hull, where the dock is either named or unnamed in the charterparty, to provide or arrange for the steamship (on or before her arrival in dock) a vacant, available, and suitable berth to which she can forthwith proceed.

"Commencement of Discharge.—On arrival in the discharging berth the steamer is at liberty to forthwith commence her discharge.

"Mode of Discharge.—It is the duty of the owner of a steamer discharging a wood cargo as above mentioned to remove the cargo from the steamer and to place it upon the quay space opposite the steamer or upon carriages on rails (termed 'bogies'), or to lower the cargo into open lighters supplied and brought alongside by the receivers, and to pay for the labour necessary to perform the above work. It is the duty of the receivers of such cargo to supply and have ready a clear quay space the full length of the steamer and/or a sufficient and continuous supply of bogies and/or suitable open lighters alongside."

A number of witnesses were called on both sides. The county court judge found that none of the defendants had anything to do with the ordering of the ship to the dock in which she discharged or with the time at which she entered it. He further found (*a*) that, having regard to the congested state of the port and the insufficient supply of bogies, which were all under the control of the North Eastern Railway Co., the *Lizzie* had been discharged as soon as possible, and that the receivers were not responsible for the delay; (*b*) that no custom had been established by which the charterers or receivers were under the alleged absolute duty to provide quay space or bogies. The plaintiff appealed.

The Divisional Court (Horridge and Hill JJ.) held that the custom, as against a single receiver of cargo, had already been found by Bray J. in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1); that it was admitted in the county

(1) 14 Com. Cas. 1.

court that the printed customs were applicable at the time in question so far as they extended, and that the difference between the parties was as to the construction and application of the relevant portions of the custom. Their Lordships held, therefore, that it was a pure question of law upon the printed document embodying the custom and practice as to what was the meaning of the custom. They were of opinion that by the custom the charterers were bound to supply bogies, and could not be relieved from doing so by the congestion of the port. If there had been a continuous supply of bogies the *Lizzie* ought to have been discharged, according to the evidence, in seven days. She was not discharged until another eleven days. Therefore, in their Lordships' view, by taking an assignment of the bills of lading, the receivers agreed to pay the demurrage which was properly payable under the charterparty, and were liable for the amount claimed, 275*l*.

The defendants appealed.

Nov. 27. *MacKinnon K.C.* and *W. H. Owen* for the appellants. In all cases where there is no fixed time for discharge the obligation on the receiver is merely to discharge within a reasonable time: see Scrutton on Charterparties and Bills of Lading, 8th ed., arts. 132 and 133, p. 309. The attempt to turn a "customary dispatch" charter into a "fixed time" charter has always failed, the last attempt being in *Hulthen* v. *Stewart & Co.* (1), where the words were identical with those in the present charterparty. Customary dispatch means customary manner of dispatch, and does not relate to the time in which the vessel is to be discharged: *Castlegate Steamship Co.* v. *Dempsey.* (2) Prima facie, the undertaking is to discharge in a reasonable, but unfixed, time; and if the receivers did their best, and were not responsible for the delay, they are not liable: *Hick* v. *Rodocanachi* (3); see also *Nelson* v. *Dahl.* (4) The shipowner must show that by the custom of the port an absolute rate of discharge is

(1) [1903] A. C. 389.
(2) [1892] 1 Q. B. 854.
(3) [1891] 2 Q. B. 626.
(4) (1879) 12 Ch. D. 568.

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guaranteed. The Divisional Court was satisfied that the printed "Statement of Custom and Practice" was proved and accepted by Bray J. in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1), but even if that custom be accepted, it merely provides the mode of discharge, and does not guarantee that there shall be no interruption. Further, the facts in that case were different; the dispute was between the shipowner and the charterer, i.e., a single receiver. Under the alleged custom the receiver, and not the charterer, is liable, and the custom is limited to a single receiver. Even assuming that the charterer would be liable under the custom, it is submitted that the liability cannot be passed to the receivers; see *Serraino & Sons* v. *Campbell.* (2) The custom is unreasonable and inconsistent with the terms of the contract. In the event of a dispute between the several receivers as to which dock the vessel is to go into, it is obvious that the alleged custom as to the right of the receiver to order the vessel into any fit and available dock cannot be complied with. Only those conditions which the receivers can perform are incorporated into the contract, and not inapplicable or insensible conditions; see Scrutton on Charterparties and Bills of Lading, 8th ed., art. 19, p. 56. A custom is a question of fact which must be strictly proved; see *Anglo-Hellenic Steamship Co.* v. *Dreyfus & Co.* (3), *Moult* v. *Halliday* (4); and the custom of a port cannot be established by persons agreeing that a particular custom is desirable: *Sea Steamship Co.* v. *Price, Walker & Co.* (5)

Compston K.C. and *Harney* for the respondent. The custom of the port as to single receivers was correctly stated by Bray J. in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1) See also the earlier decision of Mathew J. in *Beatley* v. *Bryson, Jameson & Co.* (6), which shows that the custom as to the absolute obligation on the part of the receiver to provide bogies existed in the port of Hull before the "Statement

(1) 14 Com. Cas. 1.
(2) [1891] 1 Q. B. 283.
(3) (1913) 108 L. T. 36.
(4) [1898] 1 Q. B. 125.
(5) (1903) 8 Com. Cas. 292.
(6) (1897) Unreported, but referred to in detail in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (14 Com. Cas. 1), at p. 6.

of Custom and Practice" was drawn up. By this custom incorporated into the contract, the *Lizzie* had the right to "forthwith" proceed to a dock and to be discharged "continuously" and "at her maximum rate of discharge." These words show that the custom has reference to the time within which the vessel shall be discharged, and not merely to the method of discharge. The time was calculable beforehand, and was equivalent to providing a fixed number of lay days: *Kearon* v. *Pearson*. (1) *Hulthen* v. *Stewart & Co.* (2) is not an authority against the shipowner, for in that case the vessel was discharged in the Port of London, where no such custom exists as at Hull. The custom established before Bray J. is a reasonable custom, for although it imposes an additional obligation on the receivers, it also increases the shipowner's obligations, which at common law would be limited to putting the cargo on the ship's rail. If the custom goes, the shipowner's obligation to put the cargo on to the quay goes also. But the custom need not be reasonable; it is in writing, known to all parties, and incorporated into the contract. In such a case the fact that there is an absolute obligation which may cause hardship or inconvenience is immaterial: *Porteus* v. *Watney*. (3) In *Hick* v. *Rodocanachi* (4), relied on by the defendants, the alleged absolute obligation was implied, and in *The Moorcock* (5) it was held that only reasonable obligations can be implied in a contract. The obligation in the present case is express. The word "duty" necessarily implies an absolute obligation: see *Maclay* v. *Spiller & Baker, Ltd.* (6) The receiver who buys a single parcel of a wood cargo knows that the vessel carries other parcels, and knows that the word "receivers" can only refer to the receivers as a whole, and that he cannot order the vessel into a particular dock without the consent of the other receivers.

[SWINFEN EADY M.R. What is the custom if the several receivers differ as to the discharging berth?]

(1) (1861) 7 H. & N. 386.
(2) [1903] A. C. 389.
(3) (1878) 3 Q. B. D. 534.
(4) [1891] 2 Q. B. 626, 638.
(5) (1889) 14 P. D. 64.
(6) (1901) 6 Com. Cas. 217.

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There is no custom in such a case, but if the receivers do not choose to agree to exercise their rights, the shipowner would naturally send the vessel into whichever dock he preferred.

There was no evidence before the county court judge that the printed custom as between the charterer qua sole receiver and the shipowner was not the true custom of the port. The *Lizzie* was an arrived ship as soon as she was ready to discharge: *Armement Adolf Deppe* v. *John Robinson & Co.* (1), and by taking an assignment of the bills of lading the several receivers became liable to pay the demurrage for which the charterer was liable under the custom.

[*Good & Co.* v. *Isaacs* (2) was also referred to.]

MacKinnon K.C. in reply. In *Hulthen* v. *Stewart & Co.* (3) the words "as fast as steamer can deliver" were held not to turn the charter into a fixed time charter, and the words "forthwith" and "continuous," relied on by the shipowner, are no stronger. There was no evidence before the county court judge that any receivers had ever been made liable under the custom where there had been no personal default.

Cur. adv. vult.

Dec. 5. SWINFEN EADY M.R. read the following judgment: The plaintiff is the owner of the Swedish steamship *Lizzie*, and the three sets of defendants are respectively timber merchants at Hull, and holders of the bills of lading for parcels of wood cargo, their aggregate holding representing the entire cargo.

The action was brought under the Admiralty jurisdiction of the Hull County Court to obtain payment of 275*l.*, being eleven days' demurrage of the steamer at 25*l.* a day. The county court judge gave judgment for the defendants, but on appeal the Divisional Court (Horridge and Hill JJ.) gave judgment—a joint judgment—for the plaintiff for the amount claimed, and the defendants appeal to this court.

The charterers were the Bergvik and Ala Nya Aktiebolag,

(1) [1917] 2 K. B. 204. (2) [1892] 2 Q. B. 555.
(3) [1903] A C. 389.

of Soderhamn, who were also the shippers of the cargo, and it was a customary dispatch charter. Under the bills of lading the cargo was deliverable "unto the order of the Bergvik Co., Ltd., of London, or their assigns, he or they paying freight for the same as per charterparty dated as above, all the terms and exceptions contained in which charter are herewith incorporated."

The plaintiff's claim to demurrage is based upon an alleged custom of the port of Hull, embodied by reference in the charterparty, under which receivers of wood cargoes are under an absolute obligation to provide clear quay space for unloading, or bogies into which timber can be unloaded before or immediately upon the vessel's arrival in dock, so that she can be discharged at once—at her full rate of discharge.

Upon the facts the county court judge found, having regard to the congested state of the port when the vessel arrived, and the occupation of the quay space by timber discharged from other vessels, and the insufficient supply of bogies, which were all under the control of the North Eastern Railway Co., that the ship had been discharged in the earliest possible time under the existing circumstances, and that the receivers had not caused or contributed to any delay whatever. The plaintiff contends that those facts disclose no defence to his demand. He says that the custom of Hull with regard to timber ships is tantamount to fixing a certain definite number of lay days, and that as the ship in this case was in fact delayed eleven days beyond the time in which she could have been discharged if there had been a vacant discharging berth on her arrival, and clear quay space and a sufficient supply of bogies, and if the discharge had in fact proceeded continuously at her maximum rate, therefore the defendants as receivers of cargo are liable for eleven days' demurrage. It is common ground between the parties that in the port of Hull there is a custom with regard to wood cargoes, by which the duty of the shipowner extends beyond the ordinary one of bringing the goods from the ship's hold, and delivering over the ship's rail. If the ship be lying at a

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quay berth in Hull, with a clear space, his duty is to put the cargo not only over the ship's rail, but on to the quay; or, if the receiver so requires, and if he brings bogies—which are small trucks running on rails—alongside the ship, then into these bogies.

Mr. Fenton, who was the plaintiff's first witness, and had had 52 years' experience of the shipping trade in Hull, thus describes the origin of the practice as regards receivers of timber cargoes: "Sailing ships used to come in with a number of lay days stipulated by the charterparty. To save that number of days the crew would put that timber on to the quays themselves—to save the days. Then steamers began gradually to bring some parcels of timber, and at last full cargoes of wood. Then we had ample quay room, and the shipowner dumped the cargo on to the quay. The shipowner did that for the sake of dispatch—to save his time. That involved additional cost to the shipowner—twice or three times the cost by putting it on to the quay. There were also disputes about piling, but the shipowner piled if not too high. There were never lay days for steamers in Baltic timber work. This duty imposes an additional burden on the shipowner; on the other hand, the season in the Baltic timber trade is a short one, and the sooner the ship is able to discharge its cargo, the sooner it is able to leave to obtain another cargo."

Down to this point there is no dispute between the parties, but they part company over the alleged absolute obligation to find vacant quay berths with clear space, or a vacant bogie berth before or immediately upon the vessel's arrival in dock.

The details of the present case are not in dispute. The charterparty is dated at Stockholm, August 14, 1915, and is the form known as "Scanfin," or the "Chamber of Shipping Wood-Charter, Scandinavia and Finland to the United Kingdom, 1899." The bills of lading are dated September 21, 1915. The ship arrived in the river on September 29, entered the Victoria Dock of the North Eastern Railway Co. on October 1, but there was not any berth available for the

discharge of cargo before October 6, when the ship was provisionally placed in a vacant berth on the south side, where some cargo could be, and was, discharged; on the evening of October 8 she was moved to a proper discharging berth, and about midday on October 18 her discharge was completed.

The plaintiff alleges that if a vacant discharging berth had been available on the vessel's arrival, and a sufficient supply of bogies had been continuously provided, the ship could have been discharged in five days, or at all events not later than October 7, and accordingly he claimed eleven days from October 7 to October 18. The ship carried 481 Petrograd standards of timber, under thirteen sets of bills of lading. The defendants Messrs. Hollis Brothers held the bill of lading for 277 standards, the defendants Messrs. Smith Brothers for 184, and the defendants Messrs. Smart & Elsom for 20. Upon the facts the evidence certainly established that the cargo was discharged, with all dispatch, in a time which was reasonable under the circumstances; but if the defendants were under such an absolute obligation as alleged, then the detention of the vessel for a further eleven days is not contested, subject, however, to the question whether the *Lizzie* was an "arrived ship" before October 6, when she was first in a position to discharge some part of her cargo.

The county court judge said that two questions were raised before him which he had to decide: (1.) Whether any demurrage had been incurred. (2.) If so, whether the holders of bills of lading on separate parcels were jointly liable for the whole amount.

The plaintiff now claims that by reason of the custom the demurrage became payable to him, and that the law throws that liability upon the holders of the bills of lading in such a case as the present, all the terms and exceptions of the charter being incorporated in the bills of lading. The defendants dispute any custom making any demurrage payable on the footing of an absolute obligation even by a single charterer and receiver, and in any case say that the custom alleged is inapplicable where there is more than one receiver of cargo.

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The material clauses of the charterparty are as follows :— "The steamer to be provided with a deck load, at full freight, at charterers' risk, nor exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture ; and being so loaded shall therewith proceed to Hull, Victoria or Alexandra Dock, as ordered on arrival, or so near thereunto as she may safely get, and deliver the same, always afloat, on being paid freight as follows. . . .

"The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 25*l.* per day, and pro rata for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary. The master has liberty to bring iron or other deadweight as ballast from the loading or any other port.

"The master or owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage and average."

Thus the custom of the port is incorporated in the charterparty. In order to prove the custom, the plaintiff produced a document headed "Statement of Custom and Practice," drawn up in 1899, signed by certain wood importers and shipbrokers, and by the solicitors of a shipowners' association, and printed and circulated. The material parts of it are as follows : [His Lordship read the clauses set out above and continued :] According to Mr. Fenton's evidence the lighter clause was put in because it was then contemplated to load into lighters. The statement was rather a note of what was to be considered the custom in future than what had been the custom in the past. Mr. Fenton also said that in 1899 there was a committee to standardise charterparties, and down to that time every merchant and shipowner had his own form of charterparty, each containing its own terms and clauses.

It is true that certain witnesses, when asked the question, said that the custom had been as set forth in the statement of 1899, but when they stated what in fact was the custom, they differed widely. If the receiver were under an absolute obligation to provide a vacant available berth on or before a vessel's arrival, the right of selecting the dock for the ship would be valuable, as he could choose the dock where the earliest berth could be obtained. One of the witnesses gave evidence as to the value of this right. The witnesses, however, varied remarkably in their evidence on this point, as to who had the right of selecting the dock, under the custom of the port Mr. Fenton said that the principal receiver in bulk and not by value would be entitled to choose the dock, and that the right of the charterer as such to order the ship into a particular dock did not exist.

Mr. Castleton, also called by the plaintiff, gave evidence the other way. He said that the custom was for the charterer to select the dock, unless all the receivers otherwise agreed. Mr. Linsley's evidence was that the charterer would have the right, even though he had sold the bulk of the cargo to another person, and himself retained a portion only. Again, none of the plaintiff's witnesses gave evidence of a notorious uniform and certain custom—that a receiver of wood cargo at Hull was under such an absolute obligation as alleged, and that where, by reason of the congestion at the dock or difficulty in obtaining bogies, a ship could not immediately on arrival be berthed, the receiver was nevertheless considered liable for demurrage, and habitually paid it, even though he had not caused or contributed to the delay, and had done all in his power to accelerate berthing and discharge. Mr. Linsley, who had thirty years' experience in the shipping trade, and whose partner was a signatory of the printed statement, admitted that in every case of payment of demurrage, of which he had spoken in examination in chief, the receivers had themselves unduly kept the vessels—in all cases the receivers themselves were at fault. There was other evidence to the same effect. There was also evidence that in other cases claims were made, but disputed, and were compromised for

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small sums to save litigation. The evidence, taken as a whole, completely fails to prove any uniform custom of imposing an absolute obligation on either the charterer or the receiver of cargo.

The result is that, the alleged custom not being established, the case is governed by the authorities relied upon by the county court judge, including *Hulthen* v. *Stewart & Co.* (1), where the charterparty was in the same form as the present.

In the Divisional Court the case was dealt with upon the footing that the printed statement of custom was not disputed, and that the only question was as to the construction and application of it, and that it was a pure question of law upon the document as to the construction and meaning of it. In my judgment this view is erroneous. Whether the alleged custom does or does not exist is a question of fact, and the burden lies upon the party alleging it, to prove it. The fact that different persons, who would necessarily know of the custom if it existed, take quite different views about it, and seek to read the document in different ways, as supporting their view, is evidence that no notorious uniformity in custom exists.

Even if the custom had been proved, a further question would have arisen—whether it was reasonable, which the law requires for its validity : *Nelson* v. *Dahl.* (2) The effect of it would be to imply an obligation upon the charterer or receiver for delay which he could not prevent or avoid, and which is in no sense attributable to him. In *Hick* v. *Rodocanachi* (3), Lindley L.J. stated that he was not aware of any case of liability of a person upon an implied obligation to pay damages for not doing something which is rendered impossible by causes beyond his control. This case was affirmed on appeal (*Hick* v. *Raymond* (4)). The previous decisions referred to of Bray J. and Mathew J. can only be treated as decisions on questions of fact, and the necessary facts in the present case have not been proved.

The learned county court judge arrived at the conclusion that no custom was established by which charterer or receivers

(1) [1903] A. C. 389.
(2) 12 Ch. D. 568, 575.
(3) [1891] 2 Q. B. 638.
(4) [1893] A. C. 22.

came under the alleged absolute obligation, and paid demurrage accordingly. On the contrary, he considered it proved that it was the custom of the majority of the shipowners at the port to put up with the autumn congestion at the docks without making any claim in respect of it. In my opinion, the judgment of the Divisional Court should be set aside and that of the County Court restored, with costs here and below.

DUKE L.J. read the following judgment: The firms who are defendants in this action are sued by the plaintiff upon the footing of their having jointly contracted with the plaintiff, but there has not been, in fact, any joint dealings which warranted this assumption. Each firm had become indorsee of bills of lading for various parcels of timber which formed part of the cargo of one ship, the *Lizzie*, and, except as such indorsees, they had no dealings with the plaintiff which are material in this action. The bills of lading respectively incorporated the conditions of the charterparty under which the *Lizzie* had been loaded, and by a clause of the charterparty it was provided that the vessel's cargo was to be discharged with customary steamship dispatch as fast as the steamer could deliver, but according to the custom of the port of Hull, and that, should the vessel be detained beyond the time so stipulated, demurrage should be paid at the rate of 25*l.* a day. In 1899 the leading shipowners and merchants engaged in the timber trade of Hull agreed, and set forth in a document which they then drew up, that by the custom of Hull the receiver of a wood cargo in that port ex steamer has a duty to provide or arrange for the ship on or before her arrival in dock a vacant available and suitable berth to which she can forthwith proceed, and to supply and have ready a clear quay space the full length of the steamer and/or bogies on the quays and/or lighters alongside for the discharge of the cargo. The charterparty did not specify any number of days for the discharge of the vessel, but the plaintiff contended that as the number of days required for her discharge was capable of computation on proof of the material facts, certum est quod certum reddi potest, and upon making the requisite

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proof they were entitled to rely upon the charter as a charter with lay days named, and to require payment by the defendants jointly or severally for the excess of time occupied in the discharge beyond the period so defined, namely, eleven days at 25*l.* a day, i.e., 275*l.*, the amount for which he obtained judgment against the defendants collectively in the Divisional Court. As appears from the judgments in the Court of Appeal in *Porteus* v. *Watney* (1), the plaintiff had no right to a joint judgment against the defendants.

The plaintiff made three main contentions, first, that by the custom of Hull indorsees of several bills of lading issued pursuant to the terms of the charter here in question, are held liable to pay demurrage in the events alleged here to have occurred, even though they may have individually made no default, that is, although the delay which has occurred has been due to circumstances wholly beyond their control; secondly, that the terms of the alleged custom, as set forth in the statement of claim by citation from the document of 1899, are to be read in their textual form into the contract made by incorporation of the charter into the bill of lading, and that upon the construction of the agreement so extended the defendants have expressly contracted for the discharge of the cargo of the *Lizzie* in a limited number of days; and, thirdly, that the defendants severally and collectively, or severally or collectively, have made default in regard to the discharge of the cargo which would render them liable for the demurrage in question, even though the charter were merely a charter requiring customary dispatch.

With regard to the questions of custom raised in the case, it is important to observe that access to the docks which are mentioned in the charter, the assignment of berths there, the allotment of quay space, and the supply and mode of user of bogies and lighters were shown at the trial to be under the absolute control of the railway companies who owned the docks. The agreement made in 1899 dealt with some matters in which there was existing practice at Hull, and with some matters in which apparently there was none. It is admitted

(1) 3 Q. B. D. 534.

that there was usage under which delivery of cargo was customarily made on the quay, or into bogies or lighters, and not at the ship's rail; and in two actions shipowners had successfully asserted claims for demurrage against consignees of whole cargoes, asserting grounds of claim founded on custom. In the later case, that of *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1), the learned judge disbelieved the witnesses who denied the existence of the usage which was contended for and found it to exist in the terms of the document drawn up in 1899.

Whether under present conditions a custom exists with the same incidents which were found to form the elements of the custom which was found to exist in 1908 is a question of fact, which it is not necessary to discuss. The evidence adduced in the county court demonstrated not merely that there was no uniform or certain usage in Hull as to the rights and duties of the receivers of part cargoes of wood in regard to the matters here in question, but that the most diverse and conflicting opinions are entertained with regard to the matter by men of experience and integrity. It is plain upon the evidence that there is no common agreement among business men in Hull as to the existence or mode of exercise of the rights in relation to a steamship discharging a wood cargo there on the part of a receiver of part of a cargo without which such a receiver of cargo could not enter upon the performance of his alleged customary obligations. On behalf of the plaintiff the suggestion was made that the indorsees of bills of lading could collectively exercise the rights in question, but no witness had suggested in evidence that this was a customary obligation or a customary proceeding. The opinion, if not the experience, of all of them was to a contrary effect.

The learned judge in the county court decided against the plaintiff on grounds of fact as to the alleged custom and as to the alleged actual default of the defendants. I am of opinion that no other view was possible.

The case upon which the plaintiff's counsel really relied before us was that of express contract, the second of the three

(1) 14 Com. Cas 1.

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contentions which I have enumerated. The result of accepting the arguments advanced on this branch of the case would be, as I think, to put a false construction upon the terms of the bills of lading and charterparty, and to give validity to an alleged custom which, as the judge in the county court has found, does not in fact exist. The plaintiff would secure the objects which were in view when he sought to prove the non-existent custom as to receivers of parts of cargo. There are various answers in fact and in law to this mode of setting up the plaintiff's case. First of all, the defendants did not, in fact, jointly or severally agree, as is alleged. Assuming the plaintiff to have referred in his charterparty to a supposed custom relating to receivers of parts of a cargo, the custom did not exist, and the defendants cannot be taken to have agreed with regard to it. The parties were not ad idem. If, on the other hand, the charter relates to the custom found by Bray J. in *Aktieselskabet Hekla* v. *Bryson, Jameson & Co.* (1), that custom is repugnant to the terms of the written documents, inasmuch as it invests a person or persons other than the several receivers of goods under the bills of lading with the rights in relation to the berthing of the vessel, which are essential to the exercise of the duties sought to be imposed upon the defendants, and an alleged breach of which is the foundation of the plaintiff's claim. In an action of contract, evidence which is sought to be used to incorporate in the contract a custom inconsistent therewith is not admissible: *Barrow* v. *Dyster, Nalder & Co.* (2)

These objections would, in my opinion, have been fatal to the plaintiff's alleged cause of action upon an express contract. There is another of a more general character. The plaintiff is seeking to do that which the House of Lords in *Hulthen* v. *Stewart & Co.* (3) decided ought not to be allowed to be done, namely, to convert a charter which requires customary dispatch into a charter with fixed days for discharge, and so to affect holders of bills of lading with obligations other than those by which, upon the actual language of their bills of lading,

(1) 14 Com. Cas. 1. (2) (1884) 13 Q. B. D. 635.
(3) [1903] A. C. 389, 394.

they appear to be bound. The measure of time which in *Hulthen* v. *Stewart & Co.* (1) was said by the shipowners to be equivalent to the statement of a fixed number of days differs only from the language relied on in the present case in that it was less complex. Both documents contain the same allusions to customary dispatch and custom of the port terms which affect to introduce reasonableness as a measure of obligation. The House of Lords refused to allow the construction of the charterparty in *Hulthen* v. *Stewart & Co.* (1) into a fixed time charter on grounds which are entirely applicable here. Lord Macnaghten said that for such a purpose "the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished." In the present case there are no such plain and unambiguous terms.

I am of opinion that the appeal should be allowed.

EVE J. read the following judgment: The plaintiff's claim in this action is based on an alleged breach of contract on the part of the defendants, the breach alleged being failure to provide immediately on the arrival in dock of the *Lizzie*, and continuously thereafter, adequate quay space with a sufficient number of bogies to enable the vessel to discharge her cargo between October 1 and 7. The defendants do not suggest that adequate quay space with a sufficient number of bogies was, in fact, provided, but they allege, and have established, that they were in no sense responsible for the deficiency, and in these circumstances they deny any liability on their part to pay the demurrage demanded of them. In the face of a long line of authorities culminating in *Hulthen* v. *Stewart & Co.* (1), the plaintiff could not, and did not, argue that the charterparty, apart from any local custom, is capable of being construed as anything more than a customary dispatch charter; but it includes a term that the cargo is to be discharged according to the custom of the port, and in substance he alleges that, according to the custom of the port of Hull, all the receivers of a cargo of wood goods are jointly liable

(1) [1903] A. C. 389, 394.

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to pay demurrage if the discharge is interrupted or delayed by deficiency of quay space with bogies, even though such deficiency is brought about by conditions for which the receivers are in no way responsible, and which they have no power to mitigate. In other words, he alleges the existence of a port custom whereby the liability of the receivers of a wood cargo under bills of lading incorporating this charterparty is enlarged into an absolute liability to provide landing accommodation sufficient to enable the vessel to discharge continuously at her maximum speed or to pay demurrage, failure to provide the accommodation constituting a breach quite irrespective of the question whether such failure is wilful or negligent or due to causes beyond the control of the receivers.

If such a custom exists it must be notorious and certain, and its existence must be as capable of proof as other allegations of fact. Proof of its existence is of the very essence of the plaintiff's right to recover in the action, and on the hearing of the appeal counsel on his behalf was again and again invited to indicate where such proof, or anything approaching the proof, of any notorious or certain custom such as he alleged is to be found in the evidence adduced at the trial. He completely failed satisfactorily to answer this invitation, because, to tell the truth, there is no such proof. In these circumstances I agree with the order proposed allowing the appeal from the Court below and restoring the judgment of the county court dismissing the action.

Appeal allowed.

Solicitors for appellants : *Trinder, Capron & Co.*

Solicitors for respondent : *Botterell & Roche, for A. M. Jackson & Co., Hull.*

E. C. T.

[BEFORE THE NAVAL PRIZE TRIBUNAL.]

(In Prize.)

THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, AND OTHER SHIPS.

1918 *Nov.* 11; *Dec.* 17.

THE ADJUDANT AND OTHER SHIPS.

Prize—Prize Droits—Droits of the Crown—Droits of Admiralty—Naval Prize Tribunal—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30)—*Proclamation of August* 15, 1918—*Order in Council of March* 6, 1665-6.

By Proclamation under the Naval Prize Act, 1918 (8 & 9 Geo. 5, c. 30), His Majesty declared his intention of granting prize money to his Naval and Marine Forces out of the proceeds of such prizes captured during the war as the Tribunal appointed under the Act should declare to be droits of the Crown.

The broad distinction between droits of the Crown and droits of Admiralty, which latter, formerly assigned by the Crown to maintain the dignity of the Lord High Admiral, now pass, with the other hereditary revenues of the Crown, to the Exchequer, has been stated as follows: "That when vessels come in [to any of His Majesty's ports] not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crews, or from being forced or driven in by King's ships, they belong to the Crown." (Per Sir W. Scott, in *The Maria Francoise* (1) (1806) 6 C. Rob. 282, 297):—

Held, by the Tribunal (Lord Phillimore, Admiral of the Fleet Sir George Callaghan, and Sir Guy Fleetwood-Wilson):

(*a*) That the proceeds of condemned cargoes ex neutral vessels which were either intercepted at sea by His Majesty's ships and sent into British ports [*The Hillerod*], or which called at British ports under arrangement between their owners and His Majesty's Government in order to avoid seizure at sea [*The Florida*], are droits of the Crown; but that

(*b*) the proceeds of condemned cargoes brought to this country in vessels bound to British ports in the ordinary course of their voyage [*The Abonema*], or diverted voluntarily by their owners [*The Soldier Prince*] or which called in order to bunker [*The Albania*], are droits of Admiralty, and are not payable into the Naval Prize Fund.

Held, further:

(*c*) That there is no distinction in principle between the case of

(1) *Sic*, as printed in the report.

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goods seized from a ship when she comes into port and the case of goods or their proceeds returned to this country for prize proceedings by the shipowner under arrangement with the Government, whereby, to avoid delay, the ship is allowed to proceed to her destination on an undertaking to return the goods on demand. If the goods would have been regarded as droits of the Crown, had they been taken out of the ship originally, the returned goods or their proceeds are regarded as droits of the Crown [*The Oscar II.*]. Similarly with regard to droits of Admiralty [*The Garonne*].

(*d*) That the British share of the proceeds of enemy vessels seized by a joint force of French and British vessels, and condemned in a French Prize Court, constitute a droit of the Crown [*The Tinos*].

(*e*) That an enemy vessel seized at sea by one of His Majesty's ships constitutes a droit of the Crown [*The Adjudant*]; but that an enemy vessel, seized outside a British port by the Collector of Customs, being a seizure by a non-commissioned captor, constitutes a droit of Admiralty [*The Belgia*].

CASES decided by the Naval Prize Tribunal, constituted under s. 2 of the Naval Prize Act, 1918, to determine what sums should be paid into the Naval Prize Fund in accordance with the terms of a Proclamation of August 15, 1918 (1), whereby His Majesty declared his intention of granting prize money to His Majesty's Naval and Marine Forces out of the proceeds of such prizes captured during the war as the Tribunal appointed under the Act should declare to be droits of the Crown.

Four typical cases, viz., those of *The Abonema*, *The Hillerod*,

(1) By this Proclamation (published in the London Gazette of August 16, 1918) it was ordered "that the net produce of all such prizes captured during the present war as shall be declared by the Tribunal appointed under the said Act [the Naval Prize Act, 1918] to be droits of the Crown, and of all other sums which, under that Act, shall be paid into the Naval Prize Fund, shall be for the entire benefit and encouragement of the officers and men of Our Naval and Marine Forces as defined in the above-mentioned Act, and shall be distributable in accordance with the said Act, and further, that when the Lords Commissioners of the Admiralty shall judge that there is a sufficient sum standing to the credit of the Naval Prize Fund to warrant it, a distribution shall be made in the shares and proportions and in the manner and in accordance with the Regulations We may hereafter announce by our Royal Proclamation to such members of Our Naval and Marine Forces as may be qualified to share therein, or, in case of their death, to their representatives."

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The Florida, and *The Albania* were argued in court, the remaining cases were debated in chambers.

The *Abonema* was a British ship bound from various African ports to Liverpool, where she arrived after the outbreak of war. Part of her cargo consisted of 2733 bundles of piassava, which were seized by the collector of Customs on September 2, 1914, and were condemned as enemy property on November 16, 1914. This case was typical of a number of others in which enemy goods discharged from British ships, bound to British ports in the ordinary course of their business, and without diversion by the Admiralty, had been seized and condemned as prize.

The *Hillerod* was a Swedish vessel, met at sea and diverted by a naval patrol on November 7, 1915. She was sent into Kirkwall in charge of an armed guard, and there handed over to the Customs authorities. The cargo consisted of 700,000 gallons of lubricating oil, manifested to Trondhjem and Gothenburg. On November 16, 1915, the cargo was seized, and on July 31, 1916, was condemned as contraband destined for Germany.

The *Florida* was a Danish vessel belonging to the United Steamship Company of Copenhagen. On October 26, 1915, she called at Kirkwall for examination in accordance with orders given by her owners in pursuance of their agreements with the British Government. Under these agreements all the vessels of the line engaged in the trans-Atlantic trade (except certain of the passenger steamships which agreed not to carry articles on the contraband list) undertook to call at a British port for examination before proceeding to Denmark. Similar agreements were concluded with other neutral shipping companies in pursuance of which a very large number of ships called at British ports. The seizures of parcels of cargo out of these ships were very numerous. Part of the *Florida's* cargo consisted of barrels of bone glue and a quantity of photographic films, which were seized and condemned as prize on April 30 and October 31, 1917, respectively.

The *Albania* was a Danish vessel belonging to the United

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Steamship Company. She called at Ardrossan on April 5, 1915, for bunker coal in the course of her voyage from the Mediterranean and Lisbon to Swedish and Danish ports, in accordance with the practice of the line, both before and after the outbreak of war, of coaling their steamers homeward bound from the Mediterranean at a convenient British port. Part of the *Albania's* cargo consisted of 967 tons of rice, which were seized as prize, and condemned on July 3, 1916.

Nov. 11. *Sir Frederick Smith A.-G.* (*Pearce Higgins* with him) for the Exchequer. These four typical cases, in which the Law Officers of the Crown appear on opposite sides to present the different points of view from which some of them may be regarded, have been chosen so that with the guidance which the decisions of the Tribunal will afford, the parties will be able to decide most of the remaining classes of cases for themselves. As the matter stands at present a large number of ships and cargoes have been condemned, representing in the aggregate a very considerable sum; but no decision has been given as to which of the proceeds constitute droits of the Crown, and therefore are payable into the Naval Prize Fund, and which are droits of Admiralty, and therefore belong to the Exchequer. The Tribunal is in no way bound by the form of the decree of condemnation which may have been made by the Prize Court in any particular case.

As regards "enemy property" cases no difficulty arises. It is conceded by the Exchequer (*a*) that enemy ships and cargoes seized on the high seas or in enemy ports, and (*b*) the share of the proceeds of ships and cargoes seized by His Majesty's ships in conjunction with his Allies, and allocated to this country under Joint Capture Conventions, are droits of the Crown.

The difficulty arises in the contraband cases. The immense carrying capacity of modern steamships, involving a lengthy examination of the cargo, coupled with the submarine peril, has rendered the former practice of visit and search upon the high seas practically impossible. The practice, therefore, has been adopted of diverting neutral merchant ships,

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suspected of carrying contraband, to the nearest convenient British port, where the officers of Custom take charge, and, acting under the instructions of the Contraband Committee (1), seize as prize such consignments as the Committee may direct. Thus, under modern conditions, both the examination and the decision to seize as prize have passed from the hands of naval officers at sea to civilians ashore. The effective date of detention, however, would appear to relate back to the date on which the hand of the Crown, as captor, was first laid on the goods: *The Roumanian* (2), i.e., in the case of a vessel diverted by one of His Majesty's ships, to the date of the diversion. [The learned Attorney-General then read the Order in Council of March 6, 1665–6, declaratory of the droits passing to the Lord High Admiral and to the Crown respectively. The material passages in the Order are set out in the judgment.] It appears from the preamble to the Order that through the long intermission of any war at sea "several doubts have arisen concerning certain rights of the Lord High Admiral in time of hostility," and that the determination of these was necessary, and therefore a debate had been arranged at which "King's counsel, learned in the common law, and likewise the Judge of the High Court of Admiralty" and others were present, and after full discussion His Majesty was pleased to declare in accordance with the terms of the Order. The Order, therefore, was in no sense a grant of droits to the Lord High Admiral (the Duke of York); the original grant had been made in 1660–61, shortly after the accession of Charles II., and is in the custody of the Record Office. The earlier history of prize droits will be found in Rothery's Prize Droits (edited by E. S. Roscoe), 1915, p. 13. Clearly the Order in Council cannot be interpreted literally, for, where the Lord High Admiral

(1) NOTE. The Contraband Committee, or, to give it its full title, "The Foreign Office Committee on Contraband Trade," was an inter-departmental body set up in November, 1914, and was composed of representatives of the Departments concerned in the blockade. It met daily at the Foreign Office, and dealt with all overseas shipments to neutral countries in Europe, and decided whether they should be allowed to proceed to their destination or should be placed in the Prize Court.

(2) [1916] 1 A. C. 124, 131.

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is referred to, the expression "ships and goods" is used, but where the reference is to the Crown the word "ship" alone is used, although it is obvious that goods are intended as well. Further, the expression in the first paragraph dealing with such ships "as shall voluntarily come in . . . . upon revolt" is ambiguous, and takes no note of ships which enter a port in the ordinary course of their voyage. It is submitted that it was not intended that all vessels coming in voluntarily are droits of the Crown. See *The Maria Francoise* (1), where Sir W. Scott stated the principle underlying the distinction between droits of the Crown and droits of Admiralty as follows: ". . . . when vessels come in, not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crews, or from being forced or driven in by the King's ships, they belong to the Crown. This is the broad distinction which is laid down in the Order of Council, and which has since been invariably observed." See also *The Rebeckah* (2) and *The Gertruyda*. (3) Adapting these principles to modern requirements, and applying them to the four cases in question, it is submitted as follows:—

(*a*) That the cargo ex the *Abonema* is a droit of Admiralty. She arrived in this country without any pressure, direct or indirect, from any of His Majesty's ships. Such vessels or cargoes seized in port by the collectors of Customs have always been treated as droits of Admiralty. See *The Nancy* and *The Venus* (unreported), referred to in Rothery's Prize Droits at pp. 128 and 129.

(*b*) As regards the cargo ex the *Hillerod* it is more difficult to contend that it constitutes a droit of Admiralty, as the vessel was sent in with an armed guard; but the question is whether the diversion, when no decision to seize as prize

(1) 6 C. Rob. 282, 297. (2) (1799) 1 C. Rob. 227, 231.
(3) (1799) 2 C. Rob. 211.

was taken until some time afterwards by the civil authorities, is a sufficient exercise of the hand of violence to constitute the prize a droit of the Crown.

(*c*) The cargo ex the *Florida* should be regarded as a droit of Admiralty, as although the shipowners entered into an agreement to send the ship in for examination in order to avoid the delay consequent upon diversion by one of the King's ships, causa proxima non remota spectatur. Various circumstances, commercial, political, and, no doubt, partly warlike as well, were instrumental in procuring the consent of neutral shipowners to these agreements.

(*d*) As the *Albania* called to bunker in the ordinary course of her voyage her cargo is a droit of Admiralty.

Sir Gordon Hewart S.-G. (*Captain Maxwell Anderson R.N.* with him) for the Naval and Marine Forces. It is difficult to contest the submissions made on behalf of the Exchequer that the cargoes ex the *Abonema* and the *Albania* are droits of Admiralty.

The observations made by the Attorney-General with regard to the *Hillerod* render it unnecessary to deal at any length with that case. The seizure clearly dates back to the diversion of the vessel by the armed patrol, and applying the principle stated in *The Maria Francoise* (1), it is evident that this cargo is a droit of the Crown; the vessel came in "under a motive arising out of the occasion of war."

With regard to the *Florida*, regard should be had to the dominant cause of the vessel coming into port. The shipowners were forced to enter into the agreements under the penalty of suffering the loss arising from delay and detention if their ships were diverted and sent into a British port in the ordinary way. The facts, therefore, in this case also indicate "a motive arising out of the occasion of war," and the cargo laden on board this vessel should be regarded as a droit of the Crown.

Cur. adv. vult.

Dec. 17, 1918. The judgment of the Tribunal (LORD

(1) 6 C. Rob. 282.

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PHILLIMORE, Admiral of the Fleet SIR GEORGE CALLAGHAN, and SIR GUY FLEETWOOD-WILSON) was delivered by:—

LORD PHILLIMORE. By the Naval Prize Act, 1918, 8 & 9 Geo. 5, c. 30, s. 1: "If His Majesty is pleased by Proclamation or Order in Council to signify his intention to make a grant of prize money out of the proceeds of prize captured in the present war, the sums which have been or may be received in respect of ships and goods captured during the present war specified in part 1 of the schedule" are to be paid to a fund to be called the Naval Prize Fund, which fund is to provide for the payment of prize money to the members of His Majesty's Naval and Marine Forces, and any question whether any sum is payable into or out of that fund is to be determined by this Tribunal which has been constituted for the purpose. His Majesty was pleased to make Proclamation accordingly on August 15, 1918.

Certain questions of large and far-reaching importance which came before us for determination were conveniently submitted in the form of four test cases and argued before us in open court by the Law Officers of the Crown, and we have now to express our determination upon them.

The first paragraph of part 1 of the schedule directs that there shall be paid into the Naval Prize Fund: "Any money in court paid in respect of any ship or goods condemned by any Prize Court, whether in the United Kingdom or elsewhere, being droits of the Crown." As Sir William Scott, afterwards Lord Stowell, observes in *The Maria Francoise* (1): "All rights of prize belong originally to the Crown, and the beneficial interest derived to others can proceed only from the grant of the Crown," but from ancient times a certain portion of those rights were assigned to maintain the dignity of the Lord High Admiral; hence arose the distinction between droits of the Crown and droits of Admiralty. At the outbreak of war it was the practice of the Crown to grant its interest in any prize taken to the captors thereof—that is, to the officers and men of the ship which effected the capture. This left

(1) 6 C. Rob. 282, 293.

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a few cases, which will be referred to hereafter, of droits of the Crown which had not been granted away; but, putting these aside, the practical distinction was between captures which enured for the benefit of the officers and men of individual ships of His Majesty's Navy or commissioned privateers, on the one hand, and droits of Admiralty on the other.

When the Office of Lord High Admiral ceased to be filled, and the Crown in lieu thereof appointed Lords Commissioners of the Admiralty, droits of Admiralty reverted to the Crown, and upon the surrender of the hereditary revenues of the Crown which it has been the practice for recent Monarchs to make upon their accession, and which surrender by his present Majesty is embodied in the Civil List Act, 1910, 10 Edw. 7 & 1 Geo. 5, c. 28, passed to the Exchequer. Hence arose the somewhat paradoxical position that droits of the Crown went to the Navy, and droits of Admiralty to the Exchequer. Before this war the practice was, as already stated, that each captured prize enured, subject to any rights of the flag officer, for the benefit of the officers and men of the capturing ship or ships; but at the beginning of this war the Crown did not make the usual grant. Now the Naval Prize Act and the Proclamation thereunder have constituted the droits of the Crown one fund "for the entire benefit and encouragement of the Officers and Men of Our Naval and Marine Forces." Hence it has been unnecessary for the Prize Court to determine the circumstances of any particular capture, and sufficient for it to decide that the ship or goods were lawful prize, and hence the necessity for the constitution of this Tribunal to determine as between droits of the Admiralty and droits of the Crown. In former times the distinction has been traced to an Order in Council of March 6, 1665-6, but that decision, though rendered after great debate and of unquestioned authority, is not the actual grant to the Lord High Admiral, nor is it nor does it purport to be a record of the grant. It is a decision upon what passes under the grant; and in the very changed conditions of modern naval warfare it is difficult to apply it in such a way as to

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show on which side of the line some of the seizures during the present war are to fall. At the close of the argument before us we intimated our opinion that we should desire to see the original grant to James, Duke of York, made shortly after the restoration of Charles II. on January 29, 1660-61. It is in the custody of the Record Office, and for safe preservation during the war has been sent out of London ; but it so happens that there is an authentic copy in the Exchequer Auditor's Patent Book which was available and which has been produced to us and carefully considered. It is a long document constituting the Duke of York Lord High Admiral of all His Majesty's Dominions, and Ruler (Præfectus) of the fleets and seas, giving him jurisdiction and duties in respect of the Navy, matters civil and criminal occurring on or near the sea or the mouths of great rivers below the first bridges, conservation of lights, beacons, ports and lines of coast with power to constitute a judge, lieutenants, and other officers granting Royal fish to him, and assigning a salary of 200 Marks to be paid quarterly (this is the reason why there is a copy in the Exchequer Auditor's Book), and also granting to him flotsam, jetsam, lagan, and other profits and perquisites, including bona inimicorum pro derelictis habita seu casu fortuito reperta, but silent as to any captures to be made during hostilities and any grant of prize to the Admiral. There are, however, in the patent frequent references to the rights and duties of the Admiral as existing ab antiquo or according to established law and custom, and accordingly, upon the principle laid down in *Duke of Beaufort* v. *Swansea Corporation* (1), and similar cases, we have to look to the way in which the grant to the Admiral has been construed by tribunals and applied in practice, and for this purpose the Order in Council is the earliest and most authoritative document, though there are also subsequent decisions of the High Court of Admiralty which are of assistance. We have also looked at the patent of George, Prince of Denmark, which is set out in the report of the Select Committee on the Board of Admiralty, 1861, p. 644, but it is of no assistance. The

(1) (1849) 3 Ex. 413.

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Commission to the Lords of Admiralty issued in 15 George III. is to be found in Marriott's Admiralty Decisions at p. 53. It recites that all wrecks of the sea, goods and ships taken from pirates, and divers droits, rights, duties, and privileges have been by express words or otherwise heretofore granted to Our said High Admiral and to former Admirals for their own benefit as duties appertaining to the Office or place of Our High Admiral aforesaid, and directs how these should be applied; but it has again no reference to what should happen in case of hostilities. The Order in Council is set out in 1 C. Rob. at p. 230; it is also printed with immaterial omissions by the late Mr. Rothery in his valuable report on prize droits edited by Mr. Roscoe, the present Admiralty Registrar; it is also in Marriott's Admiralty Decisions at p. 50. The terms of it are as follows: "First, that all ships and goods belonging to enemies, coming into any port, creek, or road, of this His Majesty's Kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-war or merchantmen upon revolt from the enemy, and such as shall be driven in, and forced into port by the King's men-of-war, and also such ships as shall be seized in any of the ports, creeks or roads of this Kingdom or of Ireland, before any declaration of war or reprisals by His Majesty, do belong unto His Majesty. Second, that all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the Lord High Admiral." It is not a complete dichotomy. Even from the first it left certain cases uncovered, and the Crown, when granting its interest in Prize to the captors, did not grant quite everything which it was left to it to grant after the grant to the Admiral had been exhausted. These are what Mr. Rothery calls "reserved droits." The class of case to which, whether with absolute accuracy or not, he refers, is (1.) "captures effected by a conjoint force of the Army and Navy, as on the seizure of an enemy's colony or possession; and (2.) captures made before the commencement of hostilities." There is also in the reports *Ships taken at Genoa* (1), in which

(1) (1803) 4 C. Rob. 388.

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Lord Stowell condemned a sum of money exacted by the English Admiral as commutation for ships seized in the harbour, which Lord Stowell condemned not to the captors but to the Crown. It is, however, unnecessary to consider any case of reserved droits of the Crown if they are to be treated as naval prize, because the Statute under which we sit directs that all droits of the Crown are to go to the Naval Prize Fund. One other general observation must be made. As Lord Stowell says in *The Maria Francoise* (1): ". . . .the rights of the Lord High Admiral, though they are to be duly supported, are not to be extended by construction; and for these reasons, that the grants of the Crown differ, in this respect, from other grants, that they are to be taken strictly, and are not to be interpreted to the benefit of the grantee; and, secondly, that the rights of the Crown, being public rights, deposited there for great public purposes, are not to be alienated beyond the precise tenor of the grant."

We have now to address ourselves to the four typical cases which were argued before us.

The s.s. *Abonema* was a British ship bound from the west coast of Africa to Liverpool, where she arrived on August 16, 1914. Amongst her cargo were certain bundles of piassava, which were seized by the collector of Customs and afterwards condemned as prize. This actual case does not appear to be covered in terms by the Order in Council; but the practice is well established that in all cases where vessels come into port in the ordinary course of a voyage not upon revolt from the enemy or driven in or forced into port, or have come in before declaration of war, they are with their cargo droits of Admiralty. There is no ship or set of ships which can claim to have had any hand in causing the seizure, and it is not a case of a reserved droit of the Crown. We are of opinion, and so determine, that the proceeds of the cargo taken from this ship are not to be paid into the Naval Prize Fund.

The s.s. *Hillerod* was a neutral ship met at sea on or about November 7, 1915, and sent to Kirkwall in charge of an armed guard. She had a large cargo of lubricating oil which was

(1) 6 C. Rob. 282, 297.

seized by the collector of Customs in the port of Kirkwall, and ultimately condemned as prize. In connection with this case reliance was placed upon the expression used by Lord Stowell in *The Maria Francoise* (1) that the hand of violence had been exercised upon her, and upon the judgment of the Privy Council in *The Roumanian*. (2) We are of opinion that this cargo was a droit of the Crown, and that the proceeds are payable into the Naval Prize Fund, and we determine accordingly.

The s.s. *Florida* was a Danish ship belonging to a Danish steamship company, which called at Kirkwall in virtue of a previous arrangement made by her owners with His Majesty's Government, and there submitted herself for examination. Two parcels of cargo on board her were seized by the collector of Customs, and ultimately condemned as prize. This is the most difficult case that we have had to determine. In a sense, this vessel came into port voluntarily, but not upon revolt from the enemy. To this extent her case is like those of which the *Abonema* is a type : but, on the other hand, it was the fear of His Majesty's navy and of capture at sea with all its incidents which led the owners to direct the master to proceed, and led the master to proceed to Kirkwall. The conditions of this war are different from those of any former war: the power of His Majesty's navy has been greater and more extensive, and the net has been drawn more closely than in any previous naval war. No doubt there is no King's ship, nor even are there any King's ships, to which precisely this capture could be attributed; and if the Crown had made the same kind of grant which was made in former wars, there would have been no captors to whom the Prize Court could have condemned this cargo ; but in our view this vessel ought in good sense to be held to have been forced into port by the sum total of His Majesty's navy. Her owners were forced to direct the master to take that course which saved him from seizure upon the high seas. It is also to be observed that there is nothing either in the Order in Council or in other judicial decisions, or in the practice hitherto observed, which introduces any case

(1) 6 C. Rob. 282, 297. (2) [1916] 1 A. C. 124, 131.

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at all analogous to this into the class of droits of Admiralty, and that if it be not a droit of Admiralty it must be a droit of the Crown. Upon the whole we so determine.

The s.s. *Albania* is a Swedish vessel which, while on a passage from Lisbon to Swedish and Danish ports, called for bunker coal at Ardrossan. While she was in port her cargo of rice was seized by the collector of Customs and ultimately condemned. If this vessel found herself without bunker coal upon the high seas she would be as helpless as a dismasted sailing ship, and would have to put into port to procure it. In fact she had to put into Ardrossan. To our mind it makes no difference that in accordance with sound navigation she did not load a full allowance of coal at her port of departure, but reckoned upon filling up by the way. Once started as she was, she had to replenish her stock somewhere. We think that this case falls within the principles of that part of the decision of the old Order in Council which makes for the Admiralty, that this cargo is not a droit of the Crown, and that the proceeds thereof should not be payable to the Naval Prize Fund, and we determine accordingly.

Certain cases were debated before us in chambers which in our opinion fall within the principles of the four typical cases with which we have just dealt, the distinctions being immaterial. And we accordingly now pronounce our judgment therein.

The s.s. *Soldier Prince* is a case in principle the same as the *Abonema*. She was an English ship bound to Hamburg, was diverted voluntarily by her owners, out of patriotic feeling, to an English port. Her cargo was not seized, but the shipowners sold it to recover their freight, and, after satisfying their own claims, submitted to having the balance brought into the Prize Court, where it was condemned. In our view these proceeds are a droit of Admiralty, and we so determine.

In the s.s. *Oscar II.* the only distinction from the case of the *Hillerod* was that the parcel of cargo which was ultimately condemned was not required to be discharged at Kirkwall, a process which would have been inconvenient, but the ship was allowed to proceed to her destination on an undertaking

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by the owners to bring back the parcel. In compliance with this undertaking they brought it to the port of Liverpool, where it was ultimately condemned. We conceive that there is no substantial distinction between this case and the *Hillerod*, and we determine that this parcel was a droit of the Crown.

In the case of the s.s. *Hellig Olav*, where the parcel of cargo consisted of perishable goods which it was not practicable to bring back to this country, their value was deposited in the Prize Court and ultimately condemned. In this case we think that there is no distinction to be made between it and the *Hillerod*.

In the case of the s.s. *Arkansas* the circumstances were the same as those in the *Florida* with the exception that the vessel was allowed to proceed without unloading the incriminated parcel of cargo which was afterwards brought back, in compliance with an undertaking. In our opinion there is nothing to distinguish this case from that of the *Florida*, and it is a droit of the Crown.

The s.s. *Lyngenfjord* is in the same position as the *Florida* unless her case is a fortiori. Her owners had agreed to send her into Kirkwall, but for some reason the additional precaution was taken by the Admiralty of meeting her at sea and putting an armed guard in charge of her. She is, in our opinion, a droit of the Crown.

The s.s. *Garonne* was in similar circumstances to the *Albania*. Certain items of her cargo were seized and unloaded at the bunkering port; another parcel was allowed to be taken on upon an undertaking to return it if demanded. A demand was made, and the parcel was returned and condemned. This case is like that of the *Albania*, and this parcel is a droit of Admiralty.

THE ADJUDANT AND OTHER CASES.

Lord Phillimore. These typical cases were debated before us in chambers when we had the assistance of representatives of the Admiralty and the Treasury. They seemed plain cases, and we did not require solemn argument to

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enable us to decide them, but we desire to take this opportunity of expressing our decision in open court.

The *Adjudant* was a German steam trawler captured by H.M.S. *Aurora* in the North Sea on or about September 30, 1915, sent into Grimsby in charge of a prize crew, and condemned with her cargo. This is a case of a droit of the Crown, and the proceeds must be paid into the Naval Prize Fund.

A number of enemy vessels were seized in the ports of Piræus, Eleusis, and Syra by a joint force of French and British ships. In respect of joint captures there is a Convention between His Majesty's Government and the French Republic, and under it a certain share falls to this country. These vessels (the s.s. *Tinos* and others) were condemned by the French Prize Court, and the British share has been or will be handed over to the British Government. The case is one which falls under the 4th paragraph of part I. of the schedule, which directs that there shall be paid into the Naval Prize Fund "any sums received from any of His Majesty's Allies under any Convention relating to prizes captured during the present war," and we so determine.

The *C. Ferdinand Laeisz* was captured on a separate occasion by a combined squadron of French and British ships, and was condemned in the French Prize Court. The same rule applies to the British share of her proceeds.

The *Belgia* was a German ship which was seized outside the Port of Newport by the collector of Customs of that port, assisted by some armed police, brought into port, and condemned. This is a case of seizure by a non-commissioned captor, which comes under the second paragraph of the Order in Council of 1665-6, and is a droit of Admiralty.

Solicitor for the Exchequer and for the Naval and Marine Forces: *The Treasury Solicitor.*

E. C. T.

ADMIRALTY.

(In Prize.)

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Dec. 3, 20.

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[1916, No. 1088.]

Prize Court—Contraband—"Innocent" Shippers—Ultimate Enemy Destination—Doctrine of Continuous Voyage—Consignments to Netherlands Oversea Trust Co.

A quantity of cotton goods (absolute contraband) shipped by the sellers, a neutral firm in America, on a neutral vessel for carriage to Amsterdam was seized as prize. The consignees were the N.O.T. (the Netherlands Oversea Trust Co.) acting on behalf of the buyers, a Dutch firm. Owing to the seizure the buyers refused payment, and the property in the goods remained in the shippers who were the claimants. The case for the Crown was that the buyers sold large quantities of cotton goods to Germany, and that if the goods in question had not been intercepted, they would, if the buyers could have evaded the restrictions of the N.O.T., have been resold to buyers in Germany. No allegations were made by the Crown against the claimants that they had any intention that the goods should be sent on to Germany :—

Held, that the question to be decided was what was the destination intended by the persons who would have had control of the goods when they arrived ; that neither the fact that the claimants had no intention of sending the goods to Germany, nor that the N.O.T. would have exacted guarantees of neutral consumption from the buyers, and, if they could, would have frustrated the intention of the buyers to send the goods to Germany, prevented the application of the doctrine of continuous voyage ; and that, as absolute contraband having an ultimate enemy destination, the goods were subject to condemnation.

Suit for condemnation of cargo as contraband destined for Germany.

Under a bill of lading dated March 16, 1916, nine bales of cotton piece goods were shipped by Amory, Browne & Co., of New York, wholesale exporters of cotton goods, on the Dutch steamship *Noordam* for carriage to Amsterdam. The goods were consigned to the Netherlands Oversea Trust Co. (1)

(1) The Netherlands Oversea Trust Co. was a body of Dutch traders of repute who agreed with the British Government to act as intermediaries for the purpose of getting goods from abroad consigned to Holland for Dutch consumption. The company, which was constituted by the traders themselves, gave an undertaking to take all the precautions they could, including the exacting of bankers' guarantees and fines for any infringement of the regulations, to insure that none of the cargoes consigned to them should reach enemy countries.

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for the firm of S. I. De Vries of Amsterdam to whom Amory, Browne & Co. had sold the goods through a Dutch agent in the ordinary way of business. Cotton piece goods "capable of being used in the manufacture of explosives" were made absolute contraband on October 14, 1915. In the course of her voyage the *Noordam* was detained at Falmouth pending inquiry as to her cargo, and ultimately was allowed to proceed on condition that the goods in question were returned to a British port to be placed in prize. Consequently the buyers refused to take up the shipping documents or to honour the draft for the invoice value, and the property in the goods remained in Amory, Browne & Co. A claim was put in on behalf of Messrs De Vries, but was abandoned, and a claim by Amory, Browne & Co. was substituted.

The Crown did not allege that the claimants intended or knew that the goods were to be sent on to Germany. The evidence, however, was that Messrs. De Vries sold large quantities of cotton goods to buyers in Germany, a fact they had endeavoured to conceal when their books were examined by accountants on behalf of the Cotton Export Committee; and the case for the Crown, therefore, was that if the goods had arrived in Holland Messrs. De Vries would have resold them to Germany if they could have evaded the vigilance of the Netherlands Oversea Trust Co., which it was admitted would have exacted guarantees as to neutral consumption, and have prevented the goods being forwarded to Germany if it could.

The claimants contended that in these circumstances the doctrine of continuous voyage did not apply, and that the goods could not be condemned.

The arguments and the cases cited appear in the judgment.

G. T. Simonds for the Procurator-General.

Barrington-Ward for the claimants.

Inskip K.C. and *Artemus Jones* for the Netherlands Oversea Trust Co.

Cur. adv. vult.

Dec. 20. THE PRESIDENT (LORD STERNDALE): In this case the Crown asks for condemnation of some cotton goods which

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were shipped from America to the Netherlands Oversea Trust Co., who were acting on behalf of a firm called De Vries. No doubt the Netherlands Oversea Trust Co. in delivering to De Vries would have taken all the precautions they could that the goods should not be used in any improper way, but those precautions, as we know, do not always succeed. It seems to me that the fact that the Netherlands Oversea Trust Co. would have taken certain precautions in forwarding the goods does not really affect the question in this case; and I think I must consider it as if the consignment had been made to De Vries. If the consignment had been to De Vries it might be that they would have had to give guarantees to the shipowners before they could get the goods, just in the same way as they would have had to give guarantees to the Netherlands Oversea Trust Co.

The goods were shipped on behalf of a firm called Amory, Browne & Co. in America. There is nothing said by the Crown—indeed as far as I can see there is nothing to be said—against Messrs. Amory, Browne & Co. They sold the goods in the ordinary way of business, and they had not any intention of sending them to an enemy destination. I take them to be what are called in this Court "innocent parties"—that is to say, persons who were not attempting in any way to send goods to the enemy. The goods were intercepted, and the result was that the bills of lading, which were in the hands of the shippers' bankers, were not taken up by the purchasers, and therefore the property never passed from the shippers to the purchasers. Accordingly this claim is made on behalf of the shippers; they have the property in the goods. The question is whether the goods are subject to condemnation as being absolute contraband destined for an enemy destination.

This question, it seems to me, has to be considered according to the circumstances as they would have been if the British authorities had not interfered and intercepted the consignment. Of course when the goods were once intercepted they had not any longer an enemy destination; they could not get there. But what the Court has to look at is, what was the destination, supposing nothing had been done to interfere with

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it ? It is clear that under those circumstances, if nothing had been done to interfere with the original destination, on the arrival of the goods in Holland, after the Netherlands Oversea Trust Co. had taken such precautions as they thought fit as to the consumption of the goods, the price would have been paid, the documents would have been taken up, and the goods would have been delivered to De Vries. That is the state of things which I have to consider.

I have said that there is nothing alleged in any way against the shippers in respect of any intention on their part to send the goods to enemy countries. With regard to the real consignees and purchasers, Messrs. De Vries, the matter is different. From one of the affidavits filed on behalf of the Crown it appears that De Vries "are a firm of wholesale and retail milliners ; their head office and show rooms are in Amsterdam ; they have also a number of branches in Amsterdam and other places in Holland. From the intercepted wireless messages the firm appears to have business dealings with Brasch and Rothenstein, of Berlin, in connection with the import of American goods into Germany. The firm have also been transacting business through Simon S. Polak, a commission and textile manufacturers' agent of Amsterdam, who has acted as an intermediary for the delivery of Manchester goods through Dutch firms to Fischbein and Mendel, of Berlin. British merchants were subsequently advised to sever their connection with Polak. On March 30, 1917, Messrs. S. I. De Vries were put upon the Statutory List under the Trading with the Enemy (Extension of Powers) Act, 1915." The wireless messages that were intercepted—which I need not read—mention Messrs. De Vries in communications between New York and Brasch and Rothenstein, of Berlin.

But that is not by any means the most serious matter with regard to Messrs. De Vries. Mr. Spencer, who is chief clerk to Messrs. Price, Waterhouse and Co., the well-known accountants, states in his affidavit that having to examine Messrs. De Vries' books on instructions from the Cotton Export Committee, they presented to him fabricated books and documents to conceal the fact that a large proportion of their transactions were

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with enemy countries—sending goods to the enemy countries, and getting them through when the British Government intended to stop them. According to this affidavit, these gentlemen produced to Mr. Spencer a large number of entries showing transactions with a Dutch firm. He ascertained from inquiries that such transactions had never taken place, and on a subsequent examination of the books Messrs. De Vries admitted that what they had placed before him were absolutely fabricated and false accounts ; and the real accounts which he did see afterwards showed that those transactions, which by these fabricated accounts they had represented to be with a Dutch firm, were really with enemy firms. Messrs. De Vries entered an appearance originally in this case, and they withdrew it. They may have withdrawn it because they realized that nobody, in the face of these facts, would believe any evidence that they adduced in support of their claim, or they may have withdrawn it simply because they had not got the property in the goods. I do not know.

I have no hesitation whatever in saying, on these facts, that if these goods had got into De Vries' hands they would, if De Vries could possibly have managed it, have got into Germany, and that the intention of De Vries in getting them was to send them into Germany if they could. It may be that the Netherlands Oversea Trust Co. might have been able to prevent that ; it may be that all their precautions would have failed and De Vries would have got them into Germany.

It was argued, however, on behalf of the claimants, that whatever De Vries' intention may have been was immaterial because, in order to bring in the doctrine of what is called "continuous voyage," and therefore to affect these goods by the enemy destination, it must be shown that the shippers were parties to it ; that if the shippers were innocent this doctrine could not be applied and these goods could not be condemned, because—as I understand the argument—a continuous voyage must be considered as that which the shipper sets in motion, and which he intends should have one or other destination. That contention does not seem to me to be sound. I do not think the enemy destination—which is

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a fact—can depend upon the intention of the shipper when he puts the goods on board. The doctrine was stated in *The Axel Johnson* (1) by the late President in the words of the Declaration of London, and the comment of Monsieur L. Renault upon it, which the learned President said he adopted. The Declaration of London states: "Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land." Monsieur Renault's comment upon it is: "The articles included in the list in art. 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port. As soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, it is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is established by art. 30. The journey made by the goods is regarded as a whole." In the statement of the doctrine in *The Kim* (2) the late President said: "I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare. The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether

(1) [1917] P. 234, 238. (2) [1915] P. 215, 275.

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this neutral destination was merely ostensible, and, if so, what the real ultimate destination was. As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country." Then the learned President discusses the cases on that point.

It seems to me also that this question really arose in *The Beira* (unreported), which also came before the late President. It concerned a number of cases of sardines, some shipped on the *Beira* and some on another ship. The shipper in that case was a gentleman who resided in Lisbon, but apparently had no knowledge of the intention of the consignee, who was agent for an enemy firm, to send the goods to an enemy country. In that case the claim was made by the shipper, but he had discounted the bills of lading with a Lisbon bank, and it did not appear that he had reserved any right to the disposition of the goods. That seems to me to be immaterial. The learned President held that the goods must be condemned because they were destined for an enemy country. In that case the goods were conditional contraband intended for a base of supply or the armed forces of the enemy. That question of course does not arise here.

I think the same conclusion is really involved in the decision of the Privy Council, which was delivered lately in *The Kronprinzessin Victoria*. (1) In that case it was held that the consignees were not "dummy consignees" not acting under the control of the shipper, but were persons who had bought the goods for the purpose of getting them into an enemy country. It was held that the transaction was protected by the Declaration of London as modified by the Order in Council of October 29, 1914. But if the argument before me had been sound it seems to me it would have been quite immaterial to consider that at all, because there would have been no continuous voyage of the goods. It is similar to the case now before me—the shippers not retaining control of the goods after arrival and delivery to the consignees, who bought them

(1) [1919] A. C. 261.

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for the purpose of getting them to an enemy country. The Privy Council assumed that the goods under those conditions would be liable to condemnation unless they were protected by the Declaration of London as modified by the Order in Council. Therefore it really does involve the same question, it seems to me, because those matters of the Declaration of London and the Order in Council are quite irrelevant when the Court is dealing with absolute contraband.

The only matter—I do not know that this point was really urged upon me very much—which it seemed to me might raise a doubt was that the consignment was to the Netherlands Oversea Trust Co. There is no question that the Netherlands Oversea Trust Co. are doing what is absolutely right, and no doubt they would have done what they could to prevent these goods reaching Germany. But I do not think that that is material. The question is, what is the ultimate destination, what is the destination intended by the person who will have the control of the goods when they arrive ? If they had arrived at the neutral port De Vries would have had the control, subject to this, that they would have had to give undertakings to the Netherlands Oversea Trust Co. that they would not send the goods into an enemy country. But De Vries were the purchasers ; they would have become the owners of the goods, and their intention, I have no doubt, was to send them into enemy countries. If that be so, in my opinion it cannot be said that there is not an enemy destination simply because some association, such as the Netherlands Oversea Trust Co., would do all they could to frustrate it.

For these reasons I think the goods must be condemned as good and lawful prize. It is hard, I know, upon shippers who are innocent. But unfortunately the exercise of legal rights does from time to time inflict hardship upon others. That, however, is no reason why I should refrain from saying what I think is the proper conclusion to be come to in regard to these goods. I do not know whether, under the circumstances, the Crown ask for costs ?

Simonds: No, I am instructed not to ask for costs.

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The PRESIDENT: I think that is quite right.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the Claimants: *Hyman, Isaacs, Lewis & Mills.*
Solicitor for the Netherlands Oversea Trust Co.: *A. M. Oppenheimer.*

E. C. T.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

C. A.
1918
Oct. 21; *Nov.* 9.

KENWORTHY *v.* KENWORTHY.

Divorce—Practice—Wife's Petition for Divorce—Husband's Answer countercharging Adultery with One named Man and One unknown—Duty to cite known Man as Co-respondent and to apply for Leave to be excused from citing unknown Man—Undue Delay—Striking out Countercharge—Matrimonial Causes Acts, 1857 (20 & 21 *Vict. c.* 85), *s.* 28 *and* 1866 (29 & 30 *Vict. c.* 32), *s.* 2—*Divorce Rule* 206.

A husband who in his answer to his wife's petition for a divorce countercharges her with adultery and prays for dissolution of the marriage, must make any known man with whom he alleges adultery a co-respondent, and apply for leave to proceed without making a co-respondent any unknown man with whom adultery is alleged, in the same manner as if he had presented a petition for divorce on the same grounds. If he has omitted either of these steps the proceedings, notwithstanding the husband's delay, are not in order, and the registrar's certificate that they are in order under Divorce Rule 206 will be rightly refused, and the wife's petition will not be set down for hearing until the defect is cured.

While affirming Horridge J.'s decision on the ground that this was the settled practice of the Court, the Court of Appeal made an order that unless within fourteen days the respondent cited the alleged named adulterer and applied for leave to dispense with the citation of the alleged unknown adulterer, the paragraphs of his answer whereby he asked for substantive relief be struck out. Thereupon the proceedings would be in order and the petitioner in a position to renew her application for a certificate under r. 206.

Wheeler v. *Wheeler* (1889) 14 P. D. 154 and *Harrop* v. *Harrop* [1899] P. 61 approved.

ADJOURNED SUMMONS.

In this case a wife petitioned for divorce on the grounds of her husband's cruelty and adultery. The husband denied

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the charges against him, and in his answer charged the petitioner with adultery with a man whom he named, and also with a man unknown, and asked for dissolution of the marriage.

The petitioner, after sufficient time had elapsed, took out a summons, before the Registrar, to have the answer taken off the file on the ground that the respondent had not cited the man nor obtained the leave of the Court to dispense with his citing the unknown man. The Registrar refused to make any order on the summons, and also refused to give his certificate, under r. 206, that the pleadings and proceedings were in order, and added a note to his order: "Prayer for dissolution of marriage on answer." The effect of this refusal was to prevent the cause being set down for trial.

The petitioner appealed from this order to the Judge in Chambers, who adjourned the case into court.

Rigby Swift K.C. (*Acton Pile* with him) for the petitioner. There is no relief claimed by the answer against the man charged with committing adultery, though the respondent claims divorce. Under these cases there is no necessity for that man to be made a party, and the proceedings are in order.

In any case, the petitioner is not in default, and it is a great hardship on her that the certificate should be refused, and her petition held up, on account of the respondent's default.

The sections governing the practice are ss. 28, 31, 33, and 34 of the Matrimonial Causes Act, 1857, and s. 2 of the Amending Act of 1866.

The Court may give relief, but no relief is claimed here.

[HORRIDGE J. According to the Act of 1866, s. 2, the respondent is entitled to the same relief as if he had filed a petition.]

The question whether in such a case a man named as adulterer by the husband has a right to intervene arose in *Curling* v. *Curling* (1); *Wheeler* v. *Wheeler and Rhodes* (2);

(1) (1888) 14 P. D. 13. (2) 14 P. D. 154.

Harrop v. *Harrop* (1); and *Lowe* v. *Lowe* (2); and the result of those cases is that a man so named has no right to intervene except where relief is claimed. By the same reasoning he need not be made a party.

W. O. Willis for the respondent.

In *Curling* v. *Curling* (3), which was a similar case to this, Butt J. doubted whether he had power to make a man named as guilty of adultery a co-respondent, but gave the petitioner leave to proceed without making him a party. In *Wheeler* v. *Wheeler and Rhodes* (4) the same judge, with some doubt, allowed the man so named to intervene, because the husband asked for further or other relief. In *Harrop* v. *Harrop* (1) and *Lowe* v. *Lowe* (5), it was held that where the husband did not ask for cross-relief the Court could not allow the man named as guilty of adultery to intervene. It seems to follow that the husband cannot be bound to make such a man a co-respondent when he asks for no relief against him.

HORRIDGE J. The point to be decided is important, as affecting the practice in this Division. I have very little doubt, and when I heard the matter in Chambers I had very little doubt, what my decision ought to be. As the case may go farther I thought it advisable to have it argued in open court, that I might have further assistance and the full consideration of all the cases might be insured.

The way in which the point arises is this. [The learned Judge recapitulated the steps taken in the suit as set out above, and continued:] The question whether the Registrar was right depends upon the consideration of the question in what respects a respondent making a cross-claim is bound by the same practice as a petitioner is bound by on filing a petition. In other words, has such a respondent to serve a man named in his cross-claim and to apply for leave to proceed without making the man who is unknown to him a co-respondent. The question mainly turns upon s. 28 of the Act of 1857 and s. 2 of the Act of 1866.

(1) [1899] P. 61.
(2) Ibid. 204.
(3) 14 P. D. 13.
(4) Ibid. 154.
(5) [1899] P. 204.

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By s. 28 it is provided that "upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing."

It is quite clear that the husband, if he were the petitioner, would have to make the named man a co-respondent, and apply for leave to proceed without making the unknown man a co-respondent; but in this case he is not the petitioner; but by the Act of 1866, s. 2, he is entitled to the same relief as if he had filed a petition. That relief would have to be under s. 28 combined with s. 31 of the Act of 1857 (there being no question of damages here), and the only way in which it can be given is by conforming to the provisions of the statute and making the man charged a co-respondent. It would be a strange result of the two statutes if relief could be obtained under the second of them under different conditions to those obtaining under the first.

Further than this, one must look at the reasons for requiring the adulterer to be before the Court. That appears quite clearly from the judgment of Butt J. in *Wheeler* v. *Wheeler and Rhodes*. (1) He says: "It is desirable as a matter of public policy that the Court should be possessed of all information on one side and the other before it proceeds to dissolve the marriage." One of the means the Court has of putting itself in possession of the facts is by summoning the man charged with committing adultery who knows more than anyone else. It is also a safeguard against collusion. As far as the policy of the Court is concerned it is most desirable that the same practice should be in force under both statutes.

The question for me is whether the authorities force me to a different conclusion. The first of them is *Curling* v. *Curling*. (2) In this case the husband, who was counter-charging his wife with adultery and praying for a divorce, in fact made an application to be allowed to proceed without making a co-respondent. And an order was made accordingly, but Butt J. said (3): "My doubt is whether I should have

(1) 14 P. D. 154, 156.

(2) Ibid. 13.

(3) Ibid. 14.

the power to make a man a co-respondent under such circumstances as these. However, I will allow you to proceed without a co-respondent as you ask, but I must not be taken to decide that I have the power to make a man a co-respondent in such a suit." That is going further than deciding whether the husband is bound to cite the man, because it suggests that there is no power to make him a co-respondent, although part of the relief claimed might be the assessment of damages. To my mind, however, there is ample jurisdiction, as otherwise in such case the husband could not get the same relief as if he were petitioner, as the Act of 1866 enacts.

The next case is *Wheeler* v. *Wheeler and Rhodes*. (1) In that case, a wife's petition, the respondent husband did not seek a divorce, although he countercharged his wife with adultery with a man whom he named, and who obtained an order from the Judge in Chambers permitting him to intervene. On the respondent moving to discharge the order, Butt J. confirmed his order in Chambers and allowed the intervention, although no divorce was claimed. The answer of the husband, however, contained a claim for further or other relief, and Butt J. was of opinion that those words would have been sufficient to entitle him to grant a divorce, and that as under the later Act he could grant the same relief under an answer as in the case of an original petition, he ought also to allow the intervention.

In *Harrop* v. *Harrop* (2) Gorell Barnes J., in commenting on the judge's decision in *Wheeler* v. *Wheeler and Rhodes* (1), said : " My impression is that he thought that the respondent could have been compelled to cite the applicant, and that it did not much matter whether he was cited or allowed to intervene." The Court of Appeal in *Lowe* v. *Lowe* (3) followed *Harrop* v. *Harrop* (4), and the decision below of Sir F. Jeune in the case then before them, and in affirming those two decisions expressly indicated the only case in which intervention can properly be allowed. They say (5) : " But if, on the other

(1) 14 P. D. 154.
(2) [1899] P. 61, 64.
(3) Ibid. 204.
(4) Ibid. 61.
(5) Ibid. 209.

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hand, as in the case before Butt J. of *Wheeler* v. *Wheeler and Rhodes* (1), he draws his defence in such a way that it can be fairly construed as asking for some relief further than the dismissal of the petition, the intervention of a third party can be allowed." That decision of the Court of Appeal affirming the two other cases comes to this. Where there is no claim for cross-relief there can be no intervention by any person charged, but where there is a claim for cross-relief such intervention can be allowed.

That being so, there is no direct authority that when cross-relief is claimed the alleged adulterer must be made a party, but there is the authority I have referred to of Barnes and Butt JJ., whose decisions are approved by the Court of Appeal in *Lowe* v. *Lowe* (2), and therefore the position is that the man charged is allowed to intervene if relief is claimed, but nothing can compel the husband to cite him if no relief is claimed.

There is, however, in the judgment in *Harrop* v. *Harrop* (3) a sentence exactly meeting this case. In speaking of the power of the Court to pronounce a decree of dissolution, Gorell Barnes J. says: "This can only be done where the answer contains a claim for cross-relief, and in that case the respondent, if a husband, is bound to make the alleged adulterer a co-respondent, as he would have had to do if he had presented a cross-petition."

I therefore think that for three reasons the respondent must make the named adulterer a co-respondent to his cross-claim, and get leave to proceed without making the unnamed one a co-respondent. First, by statute he is entitled to the same relief as if he had filed a cross-petition, and such would not be the case without his joining the one co-respondent and getting leave to proceed without the other; secondly, the principle that the Court is to have the advantage of having the co-respondent present to prevent collusion applies equally to an original petition and to an answer; and, thirdly, there is high authority which says so in so many words: I

(1) 14 P. D. 154. (2) [1899] P. 204.
(3) Ibid. 61.

think the Registrar was right, and I affirm his order. The appeal will be dismissed, and no costs of the wife will be taxed against the husband in respect of it. I will give leave to appeal.

J. R. B.

The petitioner appealed. The appeal was heard on November 9, 1918.

Acton Pile for the appellant.

The Registrar's order was founded on a wrong interpretation of s. 2 of the Matrimonial Causes Act, 1866. That section was intended to do away with the need of a cross-petition, and refers only to the relief given by s. 31 of the Matrimonial Causes Act, 1857. The Registrar and Horridge J. have imported into the later Act s. 28 of the earlier Act, which section deals only with procedure and not with relief, for relief is not dealt with by the earlier Act until s. 31 is reached. There are two kinds of relief in divorce—one against the respondent, the other against the co-respondent. The only relief sought by the respondent husband in this case is relief against the wife, and has nothing to do with the co-respondent. Sect. 28 of the earlier Act, requiring the alleged adulterer to be made a co-respondent, only applies to a petition, and the difficulty in the present case is caused by the practice which has grown up.

In *Curling* v. *Curling* (1) Butt J. doubted whether on a counter-charge of adultery against the wife made in her husband's answer the Court had power to make the alleged adulterer a co-respondent, but in *Wheeler* v. *Wheeler and Rhodes* (2) he allowed the alleged adulterer to intervene. In *Harrop* v. *Harrop* (3), where the husband in his answer merely alleged the adultery of his wife with a specified person, but claimed no cross-relief or other remedy, the Court decided that it had no power to allow the alleged adulterer to intervene, and the Court of Appeal similarly decided in *Lowe* v. *Lowe*. (4) The order under appeal in the present case puts upon the wife the responsibility for

(1) 14 P. D. 13.
(2) Ibid. 154.
(3) [1899] P. 61.
(4) Ibid. 204.

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making the respondent cite the co-respondent, and her petition is held up because she has not done something which she is under no obligation to do. That is the result of the present practice of requiring the husband either to cite the alleged adulterer or obtain leave to proceed without citing him, and no case has arisen like this where that practice has been used as an oppression to the petitioner.

[SWINFEN EADY M.R. According to the authorities the practice seems to be clearly established. But we cannot leave the case in mid-air.]

The certificate ought to have been granted, and if the respondent had not by then cited the alleged adulterer he could not have asked at the trial for any relief in respect of the co-respondent. As he had failed to file a pleading by the time specified in the rule the petitioner would, under the combined effect of rr. 8 and 37, be enabled to set the case down for trial, and the Court could then decide the case as if the answer had not been filed.

[SWINFEN EADY M.R. The certificate ought not to be granted in the present state of the record.]

The case was not really argued on this point before Horridge J. because he decided it on the point of procedure, and did not want to hear counsel on the question of striking out the answer. I ask the Court to strike out the answer because the time allowed under r. 8 has long gone by.

The respondent was not represented by counsel on the appeal.

SWINFEN EADY M.R. This is an appeal from Horridge J., affirming an order of Mr. Registrar Musgrave. In the proceedings the wife petitions for a divorce, alleging the adultery and cruelty of her husband, and the husband has put in an answer alleging the adultery of the wife, and praying for the dissolution of the marriage. Although his answer alleges adultery with two persons, one named and the other unknown, the husband has not cited either of the alleged adulterers, nor has he applied for any order relieving him from citing the named person or dispensing with the citation

of the unknown person. In these circumstances no certificate is now in force under r. 206, the Registrar being of opinion that the pleadings and proceeding in the cause were not correct and in order, and consequently he has been unable so to certify, and the cause cannot be set down as an effective cause for hearing. Thereupon the wife applied by summons for an order that the answer of the respondent should be taken off the file because he had not cited the alleged named adulterer nor applied for leave to dispense with the citation of the other alleged unknown adulterer. The Registrar was of opinion that no order should be made on that summons, as it was the settled practice of the Court that where the husband, on the petition of the wife, asked for relief, alleging the adultery of the wife, he must cite the alleged adulterer, or if the alleged adulterer were unknown, obtain leave to dispense with him; and so the Registrar refused to take the answer off the file, and the learned judge affirmed his decision. In my opinion the learned judge was perfectly right. That has been the settled practice of the Court for a long time, and it was so laid down by Butt J. in *Wheeler* v. *Wheeler and Rhodes* (1), where he said: "It is the clearly established practice of the Court to require him to state who the person is who is charged with committing adultery with his wife, and to make him a party to the suit"; that is to say, that is the settled practice where "the husband has, in answer to his wife's petition for a dissolution of marriage made a counter-charge of adultery against her, and prays for a dissolution of his marriage on the ground of the adultery"; that is, where the husband by his answer claims relief. Again, in *Harrop* v. *Harrop* (2), Gorell Barnes J., after referring to s. 28 of the Matrimonial Causes Act, 1857, and s. 2 of the Matrimonial Causes Act, 1866, said: "The effect of the two sections is, I think, that where the answer of the respondent is, as in this case, merely an answer, the Court cannot make a decree for dissolution. This can only be done where the answer contains a claim for cross-relief," as

(1) 14 P. D. 154, 156. (2) [1899] P. 61, 64.

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it does in the present case ; " and in that case the respondent, if a husband, is bound to make the alleged adulterer a co-respondent, as he would have had to do if he had presented a cross-petition." Now, that is not only the settled practice of the Court, but it is obviously the proper course; and in this respect no distinction can, or should, be drawn between cases where the husband claims relief against the wife in respect of her adultery on his own petition or in his answer to her petition. That being so, the appeal on that point wholly fails.

But the matter cannot be left there, and we will make that order which probably the learned judge would have made in the court below if an application had been made for it before he had given judgment on the other point. We will make an order that unless within fourteen days from to-day, or within such further time as the Judge in Chambers may direct, the respondent cites the alleged named adulterer and applies for leave to dispense with the citation of the alleged unknown adulterer, then that paragraphs 2, 3, and 4 of his answer, whereby he asks for substantive relief, be struck out. The proceedings will then be in order, and when the time has run out the petitioner will be in a position to renew her application for a certificate under r. 206 that the proceedings are in order.

BANKES L.J. I agree, and I only wish to say, in justice to the learned judge in the court below, that he appears to have been willing to make an order on the same ground, but that the point was not really argued before him.

EVE J. Mr. Acton Pile complains of delay, but it is only fair to point out that for such loss of time the wife's advisers are solely responsible, and that they have now obtained the relief which they might have had at a much earlier date.

Solicitors for the appellant : *Hamlins, Grammer & Hamlins, for Whiteley & Myers, Leeds.*

Solicitor for the respondent to the petition : *G. A. Herbert.*

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Husband and Wife—Summary Jurisdiction—Desertion by Husband—Order that Wife should not be bound to cohabit and for payment of Maintenance—Fresh Evidence—Power to discharge Order—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 7.

On August 3, 1916, the justices of B., on the application of a wife on the ground of her husband's desertion, made an order under the Summary Jurisdiction (Married Women) Act, 1895, that (1.) The wife should not be bound to cohabit; (2.) that she should have the custody of the eldest child of the marriage, a girl; (3.) that the husband should pay her 6*s.* a week for maintenance. This order was obeyed until October 17, 1917, when the wife sent the girl back to her husband. He received the girl, stopped paying the 6*s.* a week, and wrote to his wife asking her to come back and promising to receive and maintain her. The wife refused. The husband then applied to the justices to discharge the order, which they did on May 27, 1918. The wife appealed to the Divisional Court:—

Held, by Lord Coleridge J., Hill J. dissenting, that the evidence of the facts stated above was fresh evidence within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, and gave the justices jurisdiction to discharge the order, and that the appeal should be dismissed.

Held, by Hill J., that the Act only gave power to discharge the whole of an order when there was fresh evidence relating to every part of it; that there was no fresh evidence showing cause to set aside the non-cohabitation part, and therefore the justices had no jurisdiction to discharge that part, though they could discharge the rest; and the appeal should be allowed.

THIS was an appeal by the wife from the justices of West Bromwich.

On August 3, 1916, the justices on the wife's application, after finding the husband guilty of desertion, ordered that the wife should no longer be bound to cohabit with her husband; that the legal custody of the eldest child of the marriage, a girl of about fourteen, should be given to the wife, and the husband should pay 6*s.* a week for the maintenance of his wife and the girl until the order should be varied or discharged. The order was made by consent, the husband admitting desertion, because, as it was said, he was willing to

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maintain the child. The only other child of the marriage, a young boy, remained in the custody of his father.

On October 17, 1917, the wife sent the daughter to her father, and she remained with him. Thereupon the husband ceased paying the 6*s.* a week, and wrote to his wife asking her to come back and promising to receive and maintain her. He alleged that he understood that the weekly payment was for the maintenance of his child, and he had only consented to the order on that understanding. The wife refused to go back. The husband thereupon applied to the justices to discharge the order, giving evidence of the facts subsequent to the order as above stated.

On May 27, 1918, the justices discharged the whole of their former order, considering that the evidence of the facts stated constituted fresh evidence within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, s. 7. The wife appealed from this order.

Joy for the appellant. The justices had no power to discharge that part of the order which released the wife from the duty of cohabitation: *Cobbe* v. *Cobbe*. (1) It was not competent for them to do so unless the parties had determined the husband's desertion by mutual consent, as by coming together again: *Dodd* v. *Dodd*. (2) Fresh evidence within the Summary Jurisdiction (Married Women) Act, 1895, s. 7, is limited to evidence of something which has occurred since the order—e.g., a change in the husband's means.

In *Niland* v. *Niland* (3) the whole order was discharged on the wife's application, and afterwards she obtained an order for restitution of conjugal rights, but the non-cohabitation clause had been inserted without her knowledge or request.

Cotes-Preedy (*Maddocks* with him) for the respondent. The justices had power to vary or discharge their former order. The object of the Act is to enable parties to return to cohabitation. The part of the order which dealt with the custody of the child and the allowance for her was clearly

(1) (1909) 73 J. P. 208. (2) [1906] P. 189, 196.
(3) (1913) 108 L. T. 50.

dischargeable, and if part of the order is discharged the whole ought to be: *Johnson* v. *Johnson*. (1)

Joy in reply.

Cur. adv. vult.

Jan. 14. LORD COLERIDGE J., after stating the first order as above, continued: The husband, for the purpose of having the order made in that form, practically admitted desertion. The wife obtained the custody, received the maintenance, and obeyed the order. On October 7, 1917, by consent of both parties, the child was restored to the custody of the father, and since that time has been kept by the father, and naturally no further payment has been made by the husband to the wife in regard to the maintenance of the child. Nevertheless the wife insisted upon the efficacy of that part of the order which made her no longer bound to cohabit with her husband.

The husband then applied to the magistrates under s. 7 of the Act to discharge the order, and the question which we have to decide is whether, under the circumstances of the case, the only portion of the order remaining in effect being the portion which enabled the wife to resist cohabitation with her husband, it was possible and legal for the justices to discharge the order. Sect. 7 provides that the order may be altered by varying or discharging "upon cause being shown upon fresh evidence to the satisfaction of the Court," and it has not really been disputed that so far as the portions of the order dealing with the maintenance and the custody were concerned, there was fresh evidence which entitled the justices to vary, at any rate by omission, those portions of the original order. The question which is rather troubling the Court is whether the whole order, including that portion dealing with cohabitation, could be discharged at all, and whether, if it could be discharged, there was fresh evidence which justified the justices in so discharging it.

Sect. 5, sub-s. (*a*), is material to be construed on this question. [His Lordship read that section.] In the first place, it is

(1) [1900] P. 19, 21.

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well to observe that the order made under the jurisdiction conferred upon the justice by this Act is not a decree of this Court. There are various ways in which justices are empowered to deal with their orders in a manner in which it would not be competent for this Court to deal with its decrees. The order has the effect while in force no doubt of a decree of judicial separation on the ground of cruelty, but it has no such effect when it is not in force, and it is argued with some reason that that leaves open to the justices the power to rescind.

It has been clearly held, both in *Dodd* v. *Dodd* (1) and in *Harriman* v. *Harriman* (2), that the provision which entitles the applicant no longer to be bound to cohabit with her husband prevents the wife from asserting that the husband has deserted her. Of course it is clear that the husband cannot desert a wife who has obtained an order making her no longer bound to cohabit with him. Therefore it seems to me that at the time when this application was made for rescission the wife could not be heard to say that her husband had deserted her. Her only plea could rest upon the original order not being reversible, but it is that particular position which seems to me to be dealt with in s. 7. There such an original order is made capable of rescission upon cause being shown and upon fresh evidence, and if you look at the language of s. 7, always supposing the fresh evidence to be forthcoming, it would be difficult to conceive a wider discretion being given to justices in regard not only to alterations but to rescission. There are limitations in this section. One is that while they may increase or diminish the amount of any weekly payment ordered to be made, they may only do that so that the amount does not exceed the weekly sum of 2*l*. The other limitation is: if either of them shall voluntarily resume cohabitation or either of them shall commit an act of adultery the order shall, upon proof of that, be discharged. Apart from these two limitations or expositions (I would rather not say limitations) it seems to me that there is complete discretion. I see myself no difficulty in holding

(1) [1906] P. 189. (2) [1909] P. 123.

that proof of the absence of desertion is fresh evidence which would be valid to clothe the justices with discretion to discharge the order, that being the ground for the only portion of the original order which remained. Because if desertion is the only ground, as it is in this case, for a refusal of cohabitation, it is obvious that there remains no ground upon which the wife could insist on a denial of cohabitation if once that excuse of desertion was disposed of. Of course the wife could say without fresh evidence that there was the order establishing desertion at the time the order was made, and if no state of facts had arisen in the meantime to alter the state of facts upon which the decision in regard to desertion had been obtained, the husband's remedy would be gone. Apart from the wife being unable to assert desertion in face of the portion of the order giving her freedom from cohabitation, it appears to me that the husband having given honest evidence to the satisfaction of the magistrates that he was willing and anxious that his wife should go back to him and that her home was there whenever she chose to return, that is fresh evidence sufficient to discharge that portion of the order which is founded upon desertion, and it can therefore be rescinded.

It appears to me that for the sake of matrimonial harmony and for the object of bringing the parties together rather than severing them, it is very beneficial that the justices should have had these functions given to them and that they should discharge them as they have discharged them in this case.

I think therefore that this appeal must fail.

HILL J. I regret that I am unable to agree with the judgment my Lord has delivered. I regret it the more because I suspect that the trouble has arisen from the fact that the justices included in the order of August 3, 1916, a separation order which, it may be, was included without sufficient consideration and without necessity. I say it may be, because we have not the evidence that was before them at the time, and all we can go on are the orders as they stand.

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[His Lordship read the order of August 3, 1916, and the order of May 27, 1918, discharging it, and continued :] The present appeal is from the order of May 27, 1918.

The power of the justices to discharge that order depends upon s. 7 of the Act of 1895, whereby they may " alter, vary, or discharge " any order made under s. 5 " upon cause being shown upon fresh evidence to the satisfaction of the Court," and they are directed to discharge it if the wife shall voluntarily resume cohabitation with her husband or shall commit an act of adultery.

It was argued that the power to discharge was limited to cases where it was proved that the wife had voluntarily resumed cohabitation or had committed an act of adultery. I do not agree. On proof of either of those facts the justices have no option but to discharge, but their discretion to discharge upon cause being shown is not limited to those two causes. The " fresh evidence " in the section, as is shown by *Johnson* v. *Johnson* (1), means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time. If, for instance, after the hearing it became known for the first time that the wife was already married to somebody else before the marriage with the alleged husband, or that the wife before the hearing had committed adultery, I have no doubt that the justices would have jurisdiction to discharge the order. But they can discharge or vary their order only upon cause shown. In my judgment that means cause shown for discharging that part of the order which is sought to be discharged, and the order cannot be discharged as a whole unless cause is shown for discharging every part of it. Short of that, the order can only be varied so far as cause is shown for varying any part of it, and the fresh evidence must be such as establishes a cause for varying the part of the order to which the fresh evidence relates. In *Cobbe* v. *Cobbe* (2) the wife had by the original order been given the custody of two children and the sum of 7*s.* 6*d.* a week,

(1) [1900] P. 19. (2) 73 J. P. 208

which was subsequently increased to 12*s.* 6*d.* In the order appealed from the justices had given the custody of one of the children to the husband and reduced the sum to 7*s.* 6*d.* The Court said that the order varying the custody could not stand, for the justices had no power to transfer the custody to the husband unless there was evidence that the wife was guilty of misconduct, which there was not. I do not understand that "misconduct" is there used to mean adultery, but such conduct on the part of the wife as would be a good cause for saying that she was no longer fit to have the custody of the child.

In the present case the order of August 3, 1916, embraces three orders: a non-cohabitation order, a custody order, and a maintenance order. It is said that they were made by consent, and that the object of the justices was to make the husband contribute towards the maintenance of the child, which he was willing to do. If that were all, the non-cohabitation order need not have been made. But the orders were made, and, being made, in my view it has to be considered as to each of them whether good cause was shown on the new application on fresh evidence for the discharging or varying of each. The child, in October, 1917, returned to the father in a neglected condition. The justices said that the child had since been in the legal custody of the father. That, in my view, is inaccurate. The child was thenceforward in the actual custody of the father, but so long as the order of August 3, 1916, stood the child was in the legal custody of the mother. Assuming, however, that cause was shown for striking out the portion of the order which gave the wife the custody of the child, and assuming further that cause was shown for striking out the weekly payment (because the justices thought that there was no case for a weekly payment except in respect of the maintenance of the child), I am not suggesting that the justices had not power to vary the order by striking out those two parts of it. But what cause was shown for in any way altering the non-cohabitation order? None can be shown unless it be that after a wife has obtained a non-cohabitation order on

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HILL J.

the ground of desertion the husband can offer to resume cohabitation and then come to the justices and say: "I repent of my desertion. Discharge your order that my wife is not bound to live with me." I can for myself see no reason for saying that a separation order which in effect denies to the husband the right to go back to his wife or to have his wife come back to him can be got rid of in that way against the will of the wife. If that simple means were open to the husband it would be odd that Lord Gorell in *Dodd* v. *Dodd* (1) should have spoken of an order once made as very difficult to get rid of except possibly as to the amount of payment or custody of children, or that he should have gone on to point out that the justices had no power to make orders for temporary separation or of a probationary character. There would be no need for such kinds of orders if the husband's repentance and offer of amendment could create good cause for discharging the order.

I may regret what I regard as the effect of the Act, but in my view it is what I have stated. There was upon the evidence here before the justices, as far as it appears, no good cause shown for setting aside the non-cohabitation part of the order.

In my view the appeal ought to be allowed and the order of August 3, 1916, restored with liberty to the husband to apply to the justices to vary it in other respects, or indeed in respect to non-cohabitation if he could really produce fresh evidence which created a good cause in the sense in which I have stated it.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Wayne & Co., Birmingham.*

Solicitors for respondent: *Murr, Rusby & Archer, for Sharpe & Darby, West Bromwich.*

(1) [1906] P. 189.

J. R. B.

ADMIRALTY.

[In Prize.]

IN THE MATTER OF CERTAIN CRAFT CAPTURED ON THE VICTORIA NYANZA.

1918

Oct. 22;
Nov. 25.

[1918, No. 1822.]

Prize Court—Enemy Craft—Captures on Inland Waters.

Captures on inland waters are not excluded from the operation of the law of maritime prize, and enemy craft captured on an inland lake (the Victoria Nyanza) by His Majesty's armed ships are subject to condemnation as prize.

Action for condemnation as prize of a number of enemy craft and other enemy property captured on the Victoria Nyanza.

On various dates between November, 1914, and July, 1916, in the course of the naval and military operations against the Germans in East Africa, a pinnace, three steam tugs, and several lighters and dhows, together with Rs. 87,061 salved from one of the lighters, were captured by His Majesty's ships of war operating on the Victoria Nyanza. One of the vessels, the armed tug *Muanza*, was captured after an engagement with *H.M.S. Winifred*, a vessel of 700 tons armed with a 4-inch gun; but most of the craft were captured in a half-sunk condition after being abandoned by their crews, who had fled inland.

The writ in prize was issued on April 3, 1918, and it was ordered that service of the writ should be effected by the usual advertisements in the press and by filing the writ in the Admiralty registry.

No appearance or claim was entered. The question raised at the hearing was whether captures on inland waters were the subject of maritime prize. The argument and the cases cited are fully set out in the judgment.

Sir Frederick Smith A.-G. (*Pearce Higgins* with him) for the Procurator-General.

Cur. adv. vult.

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Nov. 25. THE PRESIDENT (LORD STERNDALE). In this action the Crown asks for condemnation as prize of the craft and other property mentioned in the schedule to the writ. The ground alleged for condemnation is that everything mentioned in the schedule was enemy property captured by His Majesty's ships of war. All the captures were made on the waters of the Victoria Nyanza, in East Africa.

The captor ships are described as *H.M.S. Winifred*, *H.M.S. Kavirondo*, and *H.M.S. Nyanza*. I have no precise information as to the size and description of these vessels. I believe, however, that the following description is substantially accurate: the *Winifred* and *Nyanza* were twin-screw trading steamers requisitioned and commissioned by the Admiralty, of 700 and 1146 tons respectively, and armed, the former with one 4-inch gun and the latter with one 4-inch and other guns. The *Kavirondo* was a steam tug of 200 tons, armed with one 12-pounder and other guns.

There were also on the lake three other armed vessels and an armed store ship, all of which had been trading steamers before being requisitioned by the Admiralty.

I do not know exactly what vessels the Germans had upon the lake, but they had at least one armed steam tug, the *Muanza*, which was sunk in the operations mentioned in this case, and no doubt other armed vessels. There was a considerable amount of fighting on the lake from time to time.

According to the evidence all the captor ships were commissioned ships of His Majesty's Navy, and the captured property belonged to enemies of this country. There can therefore, be no question as to its condemnation except such as may arise from the nature of the locality where the captures took place.

The Victoria Nyanza is an inland lake, and there is no access from the sea to it available for any vessels. All the vessels plying upon it, except such small craft as have been built there, have been brought overland to the lake, either whole or in sections, and then put together if necessary and launched.

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The President.

The question is whether craft and other property captured upon the waters of such a lake are the subjects of prize.

There is, so far as I know, no authority in point except *The Kingani* (1) and *The Hedwig von Wissmann.* (1) In that case the late President awarded prize bounty to *H.M.S. Mimi*, *Toutou*, and *Fifi* in respect of the *Kingani* and the *Hedwig von Wissmann*. *H.M.S. Mimi* and *Toutou* were motor launches brought from England and launched on Lake Tanganyika. They each carried one gun, and very soon after their launch they attacked and captured the German vessel *Kingani*, a larger, but much slower, vessel. She was repaired and incorporated into His Majesty's Navy under the name of *Fifi*. The three vessels after this attacked and sank the German vessel *Hedwig von Wissmann*. They were held entitled to prize bounty, and the considerations necessary for that decision are the same as those necessary for a decision as to condemnation. The conditions of Lake Tanganyika are the same as those of Victoria Nyanza; and, therefore, that case, so far as it goes, is an authority in favour of the Crown. The late President also made an order of requisition in respect of the craft with which this case is concerned. I was, however, told that the point was not discussed in either of the above cases, and, therefore, I think that I am bound to consider this case independently.

To do this I think it is necessary to consider the extent and limitations of the right to prize. I do not think I need do so at any length, for they have been discussed in *The Roumanian* (2) and *The Miramichi* (3) by the late President, and his judgments in those cases have been approved by the Privy Council. The learned President cited a passage from Hall's International Law, 6th ed., p. 435 (7th ed., p. 463), and from a note in Dana's edition of Wheaton, 8th ed., 1866, p. 451, dealing with the matter. They are fully set out at pp. 38–41 of the report in *The Roumanian*, and I need only repeat the concluding passage from Wheaton: "The matter may, then, be summed up thus: Merchandise, whether embarked upon the

(1) (1917) Lloyd's List, March 19.
(2) [1915] P. 26.
(3) [1915] P. 71.

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sea or found on land, in which the hostile power has some interest for purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea, these objections apply with so little force that the prima facie right of capture remains."

The learned President also pointed out that the Commission under which this Court acts in prize contains no limitation of the jurisdiction which would exclude the property then under his consideration. Nor does it, in my opinion, any more by its terms exclude the property which I have to consider. It is set out on p. 249 of the 1st volume of the Manual of Emergency Legislation, 1914, and is as follows :—

"Whereas a state of war exists between this country and the German Empire, so that Our fleets and ships may lawfully seize all ships, vessels, and goods belonging to the German Empire or the citizens and subjects thereof, or other persons inhabiting within any of the countries, territories, or dominions of the said German Empire, and bring the same to judgment in such Courts of Admiralty within Our dominions, possessions, or colonies as shall be duly commissioned to take cognizance thereof.

"These are therefore to authorize, and We do hereby authorize and enjoin you, Our said Commissioners, now and for the time being, or any two or more of you, to will and require Our High Court of Justice and the Judges thereof, and the said High Court and the Judges thereof are hereby authorized and required to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods already seized and taken, and which hereafter shall be seized and taken, and to hear and determine the same, and according to the course of Admiralty and the Law of Nations, and the Statutes, Rules and Regulations for the time being in force

in that behalf, to adjudge and condemn all such ships, vessels, and goods as shall belong to the German Empire or to the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Empire."

That Commission was issued under an Order in Council dated August 5, 1914. A similar Commission was issued applying to Austria-Hungary under an Order in Council dated August 20, 1914. Vide pp. 248–252 of the 1st vol. of the Manual of Emergency Legislation, 1914.

The result therefore is that prima facie all enemy property is liable to seizure and condemnation as prize, but that prima facie liability has been limited to some extent by International Law. The question I have to consider is whether this limitation excludes the present case.

The right of prize is not limited to property on the sea. This was decided in *Lindo* v. *Rodney* (1), where the property in question was property taken at the surrender of the island of St. Eustatius to His Majesty's naval and military forces. It was objected that the property was not subject to the jurisdiction of the Prize Court, because it was taken on land. Lord Mansfield and the Court of King's Bench, however, held that the property was subject to the law of prize, Lord Mansfield saying, in reference to the Commission, which is for all purposes the same as the present: "It don't say upon the sea. It don't say goods in the ship." See also the judgments in *Le Caux* v. *Eden*. (2)

It appears fairly clear that there is no settled practice by which captures on inland waters are excluded from the law of prize. On February 21, 1917, the Italian Prize Court sitting at Rome condemned as lawful prize two river steamers employed in navigation from the port of Cervignano on the River Aussa, some miles from its mouth, to Grado, on the Gulf of Trieste, and Trieste. The case itself is perhaps not entirely in point, as it proceeded to a certain extent upon the doctrine of reprisals, and it does not seem quite clear whether the actual seizure was at Cervignano or at Grado, which

(1) (1781) 2 Doug. 613, 615. [(2) (1781) 2 Doug. 594.

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is on the Gulf of Trieste. In the course of the judgment, however, reference is made to a decision of the German Prize Court, in which some Belgian ships moored in the Port of Duisberg, many miles up the Rhine, were condemned; and also to the case of the *Primula*, a Russian vessel which was seized on the River Trave between Lubeck and Travemünde. I do not know the particulars of the case as to the captures at Duisberg, but I think I may accept the statement of the Italian Court that the German Court recognized the legality of the seizure.

Another instance of the same kind is to be found in *The Cotton Plant*. (1) Although it is cited in some text books as an authority that captures on inland waters are not legal according to prize law, it seems to me to establish the opposite. The capture was made on the Roanoke river, 130 miles from its mouth, and was held illegal because it was contrary to the provisions of a statute of the United States of 1864, which provided that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof should be regarded as maritime prize. It was argued that this statute was not applicable to the case, and applied only to such inland waters as the great lakes. Strong J., in delivering judgment, said: "It is obvious that other waters than those of the great lakes were contemplated and designed to be included. The Act was passed during the war of the rebellion, and it was part of a system devised for securing captured and abandoned property in States and districts declared to be in insurrection by the President's proclamation of July 1, 1862. There was no war upon the lakes, and they were not within insurrectionary districts. If, therefore, the Act does not apply to rivers, and to rivers accessible from the sea, upon which naval captures could be made, it could never have had any practical effect. But if it applies to captures upon rivers, what reason can there be for confining its operation to seizures by the naval forces upon rivers tha run directly into the sea? The Act speaks of captures upon *any* of the inland waters of the United States. It makes

(1) (1870) 10 Wall, 577, 581.

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no distinction between rivers that run directly into the sea and those that flow into others that discharge into the sea. If any distinction exists it is purely arbitrary and judicial, rather than legislative. Both classes of rivers are inland waters ; equally such." This seems to me clearly an expression of opinion that but for the statute a seizure upon this inland river would have been a good seizure.

Starting then from the proposition that there is no general principle excluding all captures on inland waters from the operation of the law of prize, it is necessary to consider whether a capture on the Victoria Nyanza falls within the class of captures excluded from the law of prize under the principles stated in the passage from Wheaton, mentioned above, which has been approved by the late President and the Privy Council.

In considering this, regard must be had to the nature and circumstances of the Victoria Nyanza. It is a very large lake, the chief reservoir of the Nile, second only in size to Lake Superior among the fresh-water lakes of the world, and considerably larger than any other of the great American and Canadian lakes. Its greatest length is 250 miles, its greatest breadth 200 miles, and its coastline exceeds 2000 miles. Its area is about 27,000 square miles. If it be compared with other inland seas it is much smaller than the Caspian Sea, but larger than the Sea of Aral. As long ago as 1903 a steamer of 600 tons was launched on the lake, and there are many steamers and craft engaged in trading upon it. The amount of trade done is very considerable. The Victoria Nyanza lies partly in British and partly in German East Africa, and both Great Britain and Germany during the war have had armed vessels upon it.

It seems to me that the conditions of such a locality clearly come under the prima facie rights of capture, and are in no way analogous to and within the principle applicable to captures on land in land warfare. I think that the language of Taney C.J. in *The Genesee Chief* v. *Fitzhugh* (1), speaking of the great lakes, is applicable to the Victoria Nyanza.

(1) (1851) 12 Howard, 443, 453.

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"These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean." With the exception of the reference to different States of the Union which adjoined one side of the Great Lakes, this seems to me descriptive of the conditions of the present case.

On principle, therefore, I think captures on Victoria Nyanza are subject to the law of prize, and authority, so far as it exists, seems to me to be to the same effect. So far as I know, no question of prize has arisen with respect to the Caspian Sea, and the nearest analogy to the lakes of East Africa are the great lakes of America and Canada, to which I have already referred, and these have been the subject of discussion in several cases in the United States Courts. I do not propose to discuss them at any length, as they are concerned with a different question—i.e., whether the great lakes were subject to the Admiralty jurisdiction of the United States, and for that purpose great consideration is given to the question of whether they can be called "the high seas." As I have shown before, jurisdiction in prize is not confined to captures on the high seas, and therefore a good deal of the discussion in the cases mentioned is unnecessary for this purpose. It may be mentioned, however, that Admiralty jurisdiction has been given to the High Court in Uganda by the Uganda Order in Council of 1903, Article XVI. (1.): "On all matters arising upon any lake or other navigable inland waters." Two passages in the American cases are, I think, relevant. In *The Genesee Chief* v. *Fitzhugh* (1), Taney C.J., speaking of the great lakes, says: "Hostile fleets have encountered on them, and prizes been made." In speaking of prizes he must have referred to incidents of the war of 1812, or earlier, because I find that Strong J., in *The Cotton Plant* (2), points out that there was no war upon the lakes during the war of the rebellion, and says with regard

(1) 12 Howard, 443, 453. (2) 10 Wall, 577, 581.

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to the application of the United States statute to which I have already referred: "It is obvious that other waters than those of the great lakes were contemplated and designed to be included. The Act was passed during the war of the rebellion. . . . . There was no war upon the lakes, and they were not within insurrectionary districts." I know of no events between 1812 and the war of the rebellion which would give rise to questions of prize on the great lakes. See also *United States* v. *Rodgers*. (1)

In Mayers' Admiralty Law and Practice, p. 512, I find it stated that questions of prize on the great lakes had not arisen in the Canadian Courts since 1812, and that such cases were collected in the third volume of the Canadian Reports of Appeal Cases. They seem to have been decisions of Sir Alexander Croke, a descendant of the reporter of Cro. Eliz., Cro. Jac. and Cro. Car., and from the statement of counsel in *The Bellas* (2), a judge of high repute.

Unfortunately I have not been able to trace the American prize cases to which Taney C.J. refers, or to obtain the Canadian reports mentioned, but I think I am entitled to accept the statement of the Chief Justice in the United States case, and that of the writer of Mayers' Admiralty Law and Practice, which seem consistent with the report of *The Bellas* (2), that such decisions exist. If they do, they seem to me to form a complete analogy to the case of the Victoria Nyanza.

At the time *The Genesee Chief* v. *Fitzhugh* (3) and the other cases as to Admiralty jurisdiction were decided, vessels of considerable size, though not the largest, could approach the great lakes directly from the sea by river and canal, and some importance is attached to this fact by the Courts. There is, as I have before pointed out, no direct access to the Victoria Nyanza from the sea, and this might be considered to differentiate this case from that of the great lakes. But from a report of Mr. John Hay, then Secretary of State, made to the President of the United States on February 26,

(1) (1893) 150 U.S. 249, 259. (2) (1914) 1 Br. & Col. P. C. 95.
(3) 12 Howard, 443, 453.

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1900, cited in Moore's Digest of International Law, vol. I., p. 698, it appears that in 1817 there was "no navigable connection between them (the great lakes) and the ocean." If this be correct, as I have no doubt it is, the analogy between the great lakes at the date when prizes were captured thereon and the Victoria Nyanza is complete. The date of 1817 was mentioned by Mr. John Hay, because his report was concerned with an agreement of that date, and I find that the canals which give complete access from the lakes to the sea were not made till after that date. On principle and authority, in my opinion, these captures were legal according to the law of prize, and I agree with the decision of the late President as to Lake Tanganyika, to which the same considerations apply as to the Victoria Nyanza.

I make the order of condemnation as prayed.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

PROBATE.

1919
March 3.

IN THE ESTATE OF W. C. YATES, DECEASED.

Probate—Privileged Will—Seaman—Will made after receiving Orders to join Ship—Will made before the passing of the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 *Geo.* 5, *c.* 58)—*Death of Testator after the passing of that Act.*

The Wills (Soldiers and Sailors) Act, 1918, which enlarges the power of sailors to make a privileged will under the Wills Act, 1837, by putting them in the same position as soldiers, applies to the case of a sailor who made his will before, but died after, the passing of the Act of 1918.

THIS was a motion for administration of the estate of a seaman with a privileged will annexed.

The deceased was a lieutenant in the Royal Navy. He had served throughout the war. On June 22, 1916, when he was at his home at Southsea, he was appointed to a ship then stationed at the Cape. On June 29, 1916, he left his home to join his ship. On the same day, when leaving the railway station, he said to his son: "Remember that if anything happens to me, everything I possess, or am likely to possess, is to go to your mother." He died on August 29, 1918, at Cape Town. His estate, real and personal, was of the value of 710*l.* He left a wife and five children him surviving. He had made statements to his wife consistent with the statement to his son.

The widow now applied for administration with the nuncupatory will, contained in the statement to the son, annexed. The facts above stated were proved by the affidavits of the widow and the son.

The question whether this statement amounted to a privileged nuncupatory will depended upon the effect of the Wills (Soldiers and Sailors) Act, 1918 (1), which came into

(1) 7 & 8 Geo. 5, c. 58, s. 2: "Section eleven of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section."

Sect. 3 (1.): "A testamentary disposition of any real estate in England or Ireland made by a person to whom section eleven of the Wills Act, 1837, applies, and who

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operation on February 6, 1918, after the statement was made, but before the death of the deceased.

W. O. Willis for the motion. Sect. 2 of the Act of 1918 puts a seaman in the same position for the purpose of making a privileged will under the Wills Act, 1837, as a soldier was before. There is ample authority that a soldier who has received orders to start on an expedition can make a privileged will. Even apart from the provisions of the new Act the deceased was "at sea" within the meaning of the old Act. See *In the Goods of Lay.* (1)

But the Act of 1918 also enables the seaman to make a privileged will of real estate, and the Act applies to the will of a testator who dies after the date of the Act, though the will was made before that date. See *In re Bridger* (2), and the cases collected in Craies on Statute Law, 2nd ed., pp. 360, 361.

LORD COLERIDGE J. The later Act, s. 2, enlarges the qualification of a seaman under s. 11 of the earlier Act, and in the circumstances of the case it is necessary to her success that the applicant should have recourse to s. 2. The difficulty then arising is this. Does that section apply to a will made, before the passing of the Act containing it, by a testator who dies after the date of the Act? The Act itself is silent as to this, but I nevertheless think that it does so apply. That is the principle of the cases collected in Craies on Statute Law, 2nd ed., pp. 360, 361.

Of these I may specially refer to *In re Bridger* (2), where it is laid down by the Court of Appeal that the effect of a will may be enlarged by the due interpretation of a statute

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dies after the passing of this Act, shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid."

(1) (1840) 2 Curt. 375.

(2) [1894] 1 Ch. 297.

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Lord Coleridge J.

passed between the making of the will and the death of the testator, I presume because, with reference to the real and personal estate comprised in it, a will acts from the date of the death and not that of execution.

I think, therefore, that this will is within the protection of s. 2, and is entitled to probate.

Solicitors : *Fraser & Christian, for L. R. Maidment, Portsmouth.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.

1919

Feb. 13, 14.

THE GAGARA.

[1919 Fol. 2.]

Admiralty—International Law—Jurisdiction—Impleading a Sovereign Power—Status of Esthonian Government—Provisional Recognition—De facto Independence—International Comity.

On a motion to set aside a writ in rem claiming possession of a vessel in the possession of the Esthonian Government the Court invited the assistance of the Foreign Office as to the status of the Esthonian National Council. The Attorney-General on behalf of the Foreign Office stated that His Majesty's Government had, for the time being, and with all necessary reservations as to the future, recognized the Esthonian National Council as a de facto independent body and had received an informal diplomatic representative of the Provisional Government:—

Held, affirming the decision of Hill J., that such provisional recognition accorded, for the time being, to the Esthonian National Council the status of a foreign Sovereign; that to permit the arrest of the vessel would be contrary to principles of international comity, as it would compel the Esthonian Government, whose sovereignty was entitled to be respected, to submit to the jurisdiction of the British Courts; and that the writ and all subsequent proceedings must be set aside.

APPEAL from a decision of Hill J., sitting in Admiralty, setting aside a writ in rem and all subsequent proceedings against the steamship *Gagara*.

The facts, as found by the learned judge, were as follows :— The plaintiffs, described in the writ as the West Russian

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Steamship Co., Ld., on January 1, 1919, procured to be issued out of the Admiralty Court a writ in rem against "the steamship *Gagara*, now sailing under the name of the *Kajak*, and the parties interested in the said steamship." In the affidavit to lead warrant of arrest the plaintiffs were stated to be a corporate body having their registered office at Petrograd and to be the true and lawful owners of the said steamship. The writ was endorsed with a claim for possession. On January 9 appearance under protest was entered and a summons was taken out asking that the writ, service, and all subsequent proceedings be set aside on the ground that the owners of the *Gagara* were the Esthonian Government. The matter having been adjourned into court, the summons was amplified by a notice of motion alleging (1.) that the Court had no jurisdiction; (2.) that, if it had, it ought in its discretion to refuse to entertain the suit. The grounds on which it was said the Court had no jurisdiction were (*a*) that the dispute was between two foreigners as to a foreign ship; (*b*) that the ship was the property and in the service of the Esthonian Government; and (*c*) that she had been properly and lawfully condemned as prize by a decree of the Esthonian Government.

It appeared from the affidavits filed on behalf of the plaintiffs that the plaintiff company purchased the *Gagara* in 1914, and she was registered in the name of the company as owners at Petrograd under the Russian merchant flag. During the earlier part of the war the vessel was under some form of requisition in the service of the Imperial Government, and afterwards, by arrangement with the company, in the service of the succeeding Government. The Bolshevik Government having come into power, on June 21, 1918, declared the whole of the Russian mercantile fleet to be national property and ordered the *Gagara*, then lying at Petrograd, to be repaired. In the autumn of 1918 the Bolshevik Government loaded a cargo of wood on the vessel, and sent her on a voyage to Copenhagen under the captain who had originally been appointed by the company together with some of the old crew and others put on board by the Bolshevik Government. In the course of this voyage it

appeared that the *Gagara* put into Reval, where she was captured by the Esthonians.

From the affidavits filed on behalf of the Esthonian Government it appeared that the *Gagara* was flying the red flag of the Bolshevik Government and she was accordingly condemned as prize of war, not by bringing her before a Prize Court, but by a decree of the Government. She was then, under the name of the *Kajak*, registered at Reval as of Esthonian nationality and subject to the ownership of the Esthonian Republic. A new master was appointed by the Esthonian Provisional Government, and by their instructions a bill of lading, dated December 13, 1918, was signed by him for the cargo shipped by that Government to be delivered in London to their representative. The vessel, manned by a crew appointed by the Esthonian Government, then left under the Esthonian flag for London, where she arrived late in December.

The plaintiffs on December 14, from their branch office at Reval, had sent a protest to the Esthonian Government against the seizure of the *Gagara*, but without success, and accordingly the managing director, holding the company's power of attorney, issued the writ, the subject of the present proceedings.

When the motion to set aside the writ came before the Court on January 20 the learned judge invited the assistance of the Foreign Office for information as to the status of the Esthonian Government. The law officers attended on January 27, and informed his lordship that His Majesty's Government had (as indeed appeared from the correspondence between the Foreign Office and the Esthonian representatives, exhibited to the defendants' affidavits) for the time being, provisionally and with all necessary reservations as to the future, recognized the Esthonian National Council as a de facto independent body; and His Majesty's Government had accordingly received certain gentlemen as the informal diplomatic representatives of the Esthonian Provisional Government. Further, it was the view of His Majesty's Government, without in any way binding itself as to the

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future, that the Esthonian Government was such a Government as could, if it thought fit, set up a Prize Court.

Hill J., in the course of his decision allowing the motion, said that it appeared from documents in the case that the provisional recognition of the Esthonian National Council and Provisional Government was antecedent to the dates in December, when the ship was seized and condemned at Reval. In his Lordship's view the fact that the recognition was provisional and for the time being seemed irrelevant to the questions for decision. If for the time being the Esthonian National Council was recognized as a de facto independent body, and the Esthonian Provisional Government was recognized as its executive, the Courts of this country must for the time being recognize it also. And if it was recognized as an independent body, by which he understood a political body for the time being independent of every superior authority, he must recognize it as a sovereign body capable of exercising sovereign rights, including the rights of making captures jure belli and entitled to have its sovereignty respected by the Courts of the country. In his view the plaintiffs must seek their remedy in the Courts of Esthonia. The result was that the writ, the warrant of arrest, and all subsequent proceedings would be set aside with costs.

The plaintiffs appealed.

Feb. 13, 14. *Inskip K.C.* (*Dumas* and *J. Ellis Cunliffe* with him) for the appellants. The defendants have not discharged the onus upon them of establishing that the Esthonian National Council has been recognized as possessing the rights of an independent sovereign body. Internal de facto sovereignty is not sufficient. The carefully framed letters from the Foreign Office and the Attorney-General's statements to the same effect merely show a benevolent disposition towards the Esthonians, a recognition of de facto independence, and the right to be treated as belligerents. No treaty has been concluded: see as to this *The Charkieh*. (1) There is a great

(1) (1873) L. R. 4 A. & E. 59, 86.

distinction between mere recognition for the time being of a Government and recognition of a State with sovereign powers. The latter form of recognition is essential before the doctrines laid down in *The Parlement Belge* (1) can be applied. Sovereignty is a matter of public notoriety: *City of Berne* v. *Bank of England.* (2) The Court has always gone into the matter for itself unless it has before it some statement from a Government Department which is so clear that it can only come to one conclusion: see *Mighell* v. *Sultan of Johore.* (3) Further, the recognition of sovereignty must be absolute, otherwise it is incompatible with the idea of sovereignty. "The nature of the thing makes recognition, if once given, incapable of withdrawal." See Oppenheim, vol. i., 2nd ed., p. 119. See also Westlake, Part I., p. 57; Halleck, 4th ed., vol. i., p. 90; and Wheaton, 5th ed., p. 37; and, on the position of a de facto independent State, see Letters of Historicus on International Law, p. 24. An analogous case to the present was *The Manilla* (4), where in 1807-8 parts of St. Domingo were in the possession of insurgent negroes who had detached themselves from the mother country of France and maintained within those parts an independent Government of their own towards which the British Government had shown a favourable disposition; but the new power had not been "directly and formally recognized by an express treaty" and "with reluctance" it was held that those parts of the island still constituted a French colony. See also *The Helena* (5) as to the position of captures by the Algerines in 1801. [Reference was also made to *Republic of Peru* v. *Dreyfus Brothers & Co.* (6)]

Bateson K.C. and *F. Hinde* for the respondents were not called on.

BANKES L.J. This is an appeal from a decision of Hill J., which was given in the following circumstances: An action was brought in rem by the West Russian Steamship Co., Ld., against the steamship *Gagara,* now sailing under the name of the *Kajak,* and the parties interested in the steamship.

(1) (1880) 5 P. D. 197, 214.
(2) (1804) 9 Ves. 347.
(3) [1894] 1 Q. B. 149.
(4) (1808) Edw. 1.
(5) (1801) 4 C. Rob. 3.
(6) (1888) 38 Ch. D. 348, 358.

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There was a second action, also brought by the same plaintiffs, against the freight. The plaintiffs alleged that they were the owners of the steamship. They claimed a declaration to that effect, and an injunction against persons removing the ship or her cargo, or permitting the same to be removed, and a decree condemning the defendants in costs and damages.

An appearance was entered under protest. A motion was then made in the Admiralty Court to set aside the writ and all subsequent proceedings, on the ground that the Court had no jurisdiction to entertain the action. [His Lordship stated the grounds set out in the notice of motion, and continued :] Hill J. dealt with the case in reference to the claim that the vessel was the property of the Esthonian Government, and had been lawfully condemned as prize by a decree of that Government, and he gave no decision in reference to the point that the dispute was between two foreigners as to a foreign ship. From that decision this appeal is made.

The question which Hill J. decided, and which we have to decide, is whether the Esthonian National Council has been recognized by the Government of this country as having the status of a foreign Sovereign. If it has been so recognized it is not disputed that the Courts of this country would not allow that Council to be impleaded in any of these courts. The principle upon which that practice proceeds was laid down in the case of *The Parlement Belge* (1), and the passage I am going to read is quoted by Lord Esher in the case of *Mighell* v. *Sultan of Johore* (2) : " The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign,

(1) (1880) 5 P. D. 197, 214. (2) [1894] 1 Q. B. 149, 159.

ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

It appears from that passage that the principle arises from international comity, and the rule is there laid down with reference to matters in respect of which the Court will not exercise its territorial jurisdiction. In giving judgment, Hill J. indicated the reasons why he thought this particular case came within the rule so laid down. In a passage in his judgment which I will read, he says: "In the first place the Esthonian Government is in actual possession of the ship, and that Government states that the ship is being used by it for public purposes. The plaintiffs invite the Court to take that possession away by arrest of the ship and ultimately by decree to transfer it to the plaintiffs. But to permit the arrest is to compel the Esthonian Government either to submit to the jurisdiction of the Court or to lose their de facto possession, and to compel the Esthonian Government to submit to this Court the question of the ownership of the *Gagara*. In accordance with the principles laid down in *The Parlement Belge* (1) and *The Broadmayne* (2), I conceive I cannot compel the Esthonian Government to submit to the jurisdiction. But if that difficulty could be got over, there remains this further difficulty. The Esthonian Government seized the ship jure belli, and condemned her as the property of their enemy, the Bolshevist Government."

On these grounds Hill J. came to the conclusion that the case was one with reference to which the Court would not exercise jurisdiction, provided the Court was satisfied that the foreign Government were recognized by our Government as a foreign sovereign. With that part of his judgment I entirely agree.

The question therefore which remains is whether the learned judge was right in coming to the conclusion that the evidence before him was such that he ought to come to the conclusion that the Esthonian National Council had been recognized as having the status of a foreign sovereign. Upon that point I desire to refer to a passage in Lord Esher's

(1) 5 P. D. 197. (2) [1916] P. 64.

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judgment in *Mighell* v. *Sultan of Johore* (1), and to a passage in the judgment of Kay L.J., as to the materials upon which the Court is justified in acting and the materials on which the Court is constrained to act in such a matter. Lord Esher says: "I am of opinion that . . . . when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign." Kay L.J. deals with the point at greater length. He says: "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—that is to say, a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany." And then he goes on to say, dealing with the letter from the Colonial Office, signed by an official there, and purporting to be written by the direction of the Secretary of State for the Colonies: "Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive."

In the present case the statement is in the fullest sense authoritative. It emanates from the Foreign Office, and it was presented to Hill J. by His Majesty's Attorney-General. The only question is whether it amounts to a statement that the Esthonian National Council has the status of a foreign independent sovereign. Upon that the materials before the Court consist partly of certain letters which passed between the Foreign Office and some gentlemen who addressed the

(1) [1894] 1 Q. B. 149, 158, 161.

Foreign Office as being the authorized representatives of Esthonia, and partly of a statement by the Attorney-General and by junior counsel for the Treasury at the Bar before Hill J.

The submission of counsel for the appellants, as I understand it, is that, so far as the statements in the letters of the Foreign Office are concerned, they are deliberately ambiguous statements of a benevolent character, and not such an emphatic and deliberate statement of fact as the Court should require. Further, he says that no statement as to the recognition of a sovereign state can be sufficient unless it appears that the recognition is irrevocable; and on that last point he cited two passages from Westlake's International Law and Oppenheim's International Law. He has also cited passages from Hall, Halleck, and Wheaton. It does not appear, however, that these writers are entirely agreed on that particular point. At any rate, the statements of these writers have reference to conditions very different from the exceptional conditions existing as regards the status of States in Europe at the time this dispute arose.

I read the letters of the Foreign Office as being statements which do recognize, and recognize to the full, the sovereignty of Esthonia, but with the limitation that in the exceptional conditions due to the setting up of the Peace Conference no undertaking could be given to continue the recognition if conditions altered; and, speaking for myself, I think that that would be a sufficient statement to require and compel the Court to decline jurisdiction in reference to any matter which comes within the principles laid down in the passage which I have read from the judgment in *The Parlement Belge*. (1) But, however that may be, I am of opinion that the statements which were made by the law officers of the Crown are free from the objections that counsel suggested were to be found in the letters of the Foreign Office. The Attorney-General says that: "Our own Government—and looking at the affidavits in this case I see the statement is no less true whether of the Government of France or the

(1) 5 P. D. 197.

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Government of Italy—has for the time being provisionally, and with all necessary reservations as to the future, recognized the Esthonian National Council as a de facto independent body, and accordingly has received a certain gentleman as the informal diplomatic representative of that Provisional Government. The state of affairs is of necessity provisional and transitory. The matter remains to be determined in the way that has been described." Junior counsel for the Treasury, at a later stage, said: "If it will assist the Court—I am sorry the Attorney-General is not here now—but I have had the opportunity of putting to him the point which has arisen, and I have his authority for stating to the Court that, in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a Government as could, if it thought fit, set up a Prize Court."

Reading these deliberate statements of the Law Officers of the Crown, as expressing the attitude of the Government towards this Esthonian National Council, I cannot but feel that if the Court claimed to exercise, and did exercise, jurisdiction in respect of such a dispute as arises in this action, they would not be acting in accordance with what was pointed out in *The Parlement Belge* (1) as being the principle of international comity, and that there would be a divergence of action as between the Courts of this country and the statements that have been made by the Government of the country as to the attitude which this country was prepared to take.

On these grounds, in my opinion, the view taken by Hill J. was right.

WARRINGTON L.J. I am of the same opinion, for the same reasons, and have nothing to add.

DUKE L.J. I entirely agree.

Appeal dismissed.

Solicitors for the appellants: *Ince, Colt, Ince & Roscoe.*
Solicitors for the respondents: *Wm. A. Crump & Sons.*

(1) 5 P. D. 197.

E. C. T.

ADMIRALTY.

1919

Feb. 24, 26.

THE ANNETTE; THE DORA.

[1919, fos. 134, 135.]

Admiralty—Jurisdiction—Discretion—Possession Actions—Foreign Ship—Status of Provisional Government of Northern Russia—Recognition of Sovereignty—"Informal" Recognition—Consideration of Foreign Municipal Law—Modern Practice.

The plaintiffs, Esthonian subjects, the owners of two sailing vessels, with the approval and support of the Esthonian Government, issued writs in rem claiming possession of the vessels, which had been requisitioned or sequestered by the Provisional Government of Northern Russia, and by them hired to a partnership association for the purposes of trading, subject to the control of the Director of Naval Transports. The Provisional Government entered appearances under protest, and motions were set down to set aside the writs and all subsequent proceedings on the grounds, inter alia, that the vessels were in the service of the Provisional Government and therefore immune from arrest; and that the dispute was between foreigners as to the possession of foreign ships, and therefore that, even if the Court had jurisdiction, it should decline to exercise it.

The learned judge invited the assistance of the Foreign Office as to the status of the Provisional Government of Northern Russia, and was informed by the Secretary of State for Foreign Affairs that, while the Allied Powers were co-operating with the Provisional Government in the opposition which that Government was making to the forces of the Russian Soviet Government, the Provisional Government had not been "formally recognised either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent state":—

Held, (*a*) that the Court could not infer from the letter from the Foreign Office that the Provisional Government of Northern Russia had been "informally" recognized as a sovereign independent state; (*b*) that although under the control of an official of the Provisional Government the vessels were not in the possession or service of the Government; and (*c*) that, even under the older decisions, the Court in its discretion would entertain a possession suit between foreigners if the representative of the foreign state to which the vessel belonged requested the intervention of the Court. On all these grounds the motions would be dismissed.

In modern times the reasons for refusing to entertain a suit involving questions of foreign municipal law are much less strong than in the time of Lord Stowell.

MOTIONS to set aside writs, warrants of arrest, and all

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subsequent proceedings against two Russian sailing vessels, the *Annette* and the *Dora*.

The plaintiff in the case of the *Annette* was Arton Altenbrun, and in the case of the *Dora*, C. Markson. Both were Esthonian subjects. Each claimed "on behalf of himself and all others the owners" of the *Annette* and *Dora* respectively. The defendants were "the persons in possession" of the respective vessels "and all others claiming any right or interest therein."

A number of grounds, which are stated in the judgment, were set out in the notices of motion, the chief grounds being (*a*) that the vessels had been sequestered and/or requisitioned by the Provisional Government of Northern Russia, and were running in the service of that Government; and (*b*) that the disputes being between foreigners as to the ownership of foreign ships, the Court should refuse to entertain the actions.

From the affidavits filed in support of the motions it appeared that the *Annette*, a vessel of 161 tons, of the port of Nava, and the *Dora*, a vessel of 137 tons, of the port of Riga, had been lying for two years at Archangel and were then sequestered and/or requisitioned by the Provisional Government of Northern Russia in or about September, 1918. Certificates in lieu of bills of sale were then given by the director of Naval Transports in Archangel to the Co-operative Labour Association of the Russian merchant fleet known as the "Polyarnaya Zvyezda" (Polar Star), which stated that by agreement dated September 20, 1918, the vessels were hired to the Polar Star Association "for the purpose of trading, the members of the association personally co-operating in the execution of all work connected with the exploitation of the vessels for their mutual account and risk." It also appeared that the trading was to be under the control of the director of Naval Transports. In pursuance of these agreements the Polar Star Association loaded cargoes of tar in the two vessels for Liverpool where they were arrested in the present actions by the plaintiffs, who alleged that the vessels had been left at Archangel, as it was impossible to get them away owing to the fact that the Russians were fighting amongst themselves, and the owners were entirely shut off from Archangel. The

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affidavits to lead the warrants of arrest were made by the Esthonian consular agent for Liverpool.

When the motions came before the Court on February 17 Hill J. said that he would require information from the Foreign Office as to the status of the Provisional Government of Northern Russia and adjourned the hearing for this purpose. At the adjourned hearing the following letter from the Foreign Office to the Admiralty Marshal was read:

"Sir,—I am directed by Earl Curzon of Kedleston to acknowledge the receipt of your letter of the 17th inst., requesting that Sir Maurice Hill, Judge of the Admiralty Court, might be furnished with a certificate in writing setting forth the status and position of the Provisional Government of Northern Russia—namely, as to whether such government is one duly recognised by His Majesty's Government and has all the attributes of a sovereign state.

"In reply I am to inform you that the Provisional Government of Northern Russia is composed of Russian groups who do not recognise the authority of the Russian Central Soviet Government established at Moscow. The seat of the Government is Archangel, and it extends its authority over the territory surrounding that port and to the west of the White Sea up to the Finnish frontier. As the title assumed by that Government indicates, it is merely provisional in nature, and has not been formally recognised either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent state. His Majesty's Government and the Allied Powers are however at the present moment co-operating with the Provisional Government in the opposition which that Government is making to the forces of the Russian Soviet Government, who are engaged in aggressive military operations against it, and are represented at Archangel by a British Commissioner. The representative of the Provisional Government in London is Monsieur Nabokoff, through whom His Majesty's Government conduct communications with the Archangel Provisional Government.

"I am, Sir, etc."

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Feb. 26. *Dumas* for the defendants in support of the motions. The letter from the Foreign Office merely states that the Provisional Government has not been "formally" recognized as having the status of a sovereign independent state. The facts (*a*) that there is a representative of the Provisional Government in London through whom His Majesty's Government conduct diplomatic communications, and (*b*) that British troops are fighting on behalf of the Provisional Government show that, at any rate, the Government has been "informally" recognized. The cases therefore are indistinguishable from *The Gagara* (1), where the informal recognition of the Esthonian Government was held sufficient to constitute that Government for the time being a sovereign power. The Provisional Government sequestered or requisitioned the vessels, and although run by the Polar Star Association the Government remains in possession of them through its agent, the director of Naval Transports. Cf. *The Broadmayne.* (2) Further, there are disputes between two foreign owners involving an intricate inquiry and probably a number of commissions to take evidence in Russia as to the Russian law on the subject. "It is with the greatest reluctance that the Court adjudicates in suits of possession where foreigners alone are concerned." See Williams' and Bruce's Admiralty Practice, 3rd ed., pp. 29 and 30, and the cases there cited.

Bateson K.C. and *F. Hinde* for the plaintiffs. The defendants have not made out that the Provisional Government is a sovereign independent state using the vessels for public purposes. Neither vessel is in the possession of the Provisional Government, which parted with its control when it hired the vessels out for purposes of trade. The Court will always entertain an action between foreigners when both parties are before it, and the plaintiffs' Government, as in the present case, request the Court to intervene. See *The See Reuter.* (3) The reason underlying the old cases in which the Admiralty Court declined to adjudicate in possession cases was the fear of prohibition if it interfered in cases which might involve

(1) Ante, p. 95. (2) [1916] P. 64.
(3) (1811) 1 Dods. 22.

questions of title, but since the Admiralty Court Act of 1840 conferred jurisdiction to investigate questions of title the reason disappeared. There are no Courts in Russia at the present time in which the plaintiffs could seek redress, and the actions should be allowed to proceed.

Dumas, in reply, cited *The Victoria* (1) and *The John*. (2)

HILL J. I will deal first with the *Annette*. In this case a writ in rem has been issued by Anton Altenbrun, "on behalf of himself and all others, the owners of the sailing vessel *Annette*," against "the persons in possession of the sailing vessel *Annette*, and all others claiming any rights or interest therein." A warrant of arrest has also been taken out and executed, the ship is under the arrest of the Court, and the writ has been served in rem upon the ship. The affidavit to lead warrant was made by Mr. A. V. Timusk, describing himself as Esthonian consular agent for the City of Liverpool. The *Annette* was in Liverpool, and was there arrested, and the affidavit alleges that in September, 1918, when the *Annette* was lying at Archangel, "one Edward Sloka and other persons wrongfully took possession of the said vessel, and, purporting to act as owners of such vessel, have since been, and are still, in wrongful possession of the same": and also that he (Mr. Timusk) was informed that Edward Sloka was acting as master.

The vessel was also stated to be registered at the port of Narva, in Esthonia. That seems to be the fact.

So far as the matter stands on that affidavit it would appear to be a dispute between the plaintiff on the one hand on behalf of himself and the other owners of the *Annette* and Mr. Sloka and others on the other hand, as to the right to the possession of an Esthonian merchant vessel, of which the plaintiff alleges himself to be the owner and of which Mr. Sloka and others have possession. An appearance under protest has been entered for the defendants, who are described as the persons in possession and all others claiming any rights or interest in the ship. The motion is made to set aside the writ, the arrest, and all subsequent proceedings.

(1) (1859) Swab. 408. (2) (1830) 2 Hagg. Adm. 305.

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Counsel in support of the motion says that he appears on behalf of the following persons: (1.) The Provisional Government of Northern Russia; (2.) Mr. Sloka, as master of the *Annette*; and (3.) Mr. E. H. G. Breede, appointed by the Provisional Government of Northern Russia to manage the *Annette* on behalf of that Provisional Government. The notice of motion gives a number of reasons why the writ, arrest and all subsequent proceedings should be set aside. The first is that "no notice has been given to the Russian Consul." If there is anything in that, it has been cured, because notice has now been given. Then there are these reasons: that "the sailing vessel *Annette* was and is in the service of the Provisional Government of Northern Russia; that the said vessel is sequestered by and/or requisitioned by the said Provisional Government of Northern Russia and is running in the service of such Government; that the said vessel in such circumstances is immune from arrest; that the said vessel is the property for the time being of the said Provisional Government of Northern Russia." That is one group of objections. The other ground of objection is that this dispute is between two foreigners as to a foreign vessel, and it is said that even if the Court has jurisdiction, it ought in its discretion to decline to exercise it.

I will deal first with the main point, which is that the vessel is in the possession of a Government which for the time being is a sovereign Government, and is being used by that Government for public purposes; and accordingly that the Court cannot allow arrest of the ship and cannot compel the Government by arrest to submit to a jurisdiction to which it is under no obligation to submit unless it chooses to do so. In my opinion the answer to that depends upon the consideration of two or possibly three matters. First, is this Government for the time being—I think it is sufficient if it is for the time being—recognized by the British Government as a sovereign power? Secondly, is it in fact in possession of the vessel? And, thirdly, it might be necessary to consider, if it is in possession, is it using the vessel for public purposes? I am not sure that if I were satisfied that the Provisional Government was a

sovereign power, and was in possession, I should consider myself at liberty to look any further.

On the question whether this Government which claims to be a de facto sovereign power is so recognized, I invited the assistance of the Foreign Office, and I have their letter. Having read the letter with great care, I am unable to draw from it the conclusion that the Provisional Government of Northern Russia is recognized by the British Government as a sovereign power. [His Lordship read the letter set out above and continued :]

The position upon this letter seems to me to be very different from the position in *The Gagara* (1), where statements were made to the Court by the Law Officers of the Crown as to the recognition of the Esthonian Provisional Government. I have here a mere negative statement that the Provisional Government of Northern Russia "has not been formally recognised" by his Majesty's Government. I am asked to infer from that that it has been "informally recognised" as a sovereign state. I do not think I ought to draw that conclusion. I must be satisfied before I can recognize the Provisional Government of Northern Russia as a sovereign state, for the purposes of this case, that the British Government so recognize it. I am not satisfied.

But even if I were satisfied that the Provisional Government of Northern Russia was a sovereign state, I should then have to consider whether the Government is in possession of this vessel. If it is not in possession, the Court interferes with no sovereign right of the Government by arresting the vessel, nor does it, by arresting the vessel, compel the Government to submit to the jurisdiction or to abandon its possession. As I read the affidavits which have been filed on behalf of the applicants, disregarding those on the other side—for it is merely a motion to determine whether I should allow the case to continue and not to decide the case finally—it is not made out to my satisfaction at all that the vessel is in the possession of the Provisional Government—quite the contrary—nor that the vessel has been in the use of

(1) Ante, p. 95.

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the Provisional Government for public purposes. It is said that the *Annette*, being at Archangel, was requisitioned or sequestered, but the same document which states that—namely, the certificate (in lieu of bill of sale) put on board the vessel—says that the vessel was afterwards transferred by agreement dated September 20, 1918, "whereby the vessel is hired to the said Association, 'Polar Star,' for the purpose of trading, the members of such association personally co-operating in the execution of all work connected with the exploitation of the vessel for their mutual account and risk, they giving a reciprocal bond whereby each member is responsible for the whole, such trading to be under the control and in accordance with the instructions of the director of Naval Transports."

In my opinion all that the affidavits show is that this vessel, having been taken over by the Provisional Government of Northern Russia, was let out to hire to some sort of partnership called the "Polar Star" for the purpose of trading, and that the "Polar Star" were to run the vessel for their mutual account and risk, but subject to the limitation, that the trading was to be under the control and in accordance with the instructions of the director of Naval Transports. It seems to me that upon the vessel being handed over to that association, if she ever was in the possession of the Provisional Government she passed out of that possession and was put into the possession of this partnership, not as agents of the Provisional Government, but under a contract by which, in effect, the vessel was demised to the partnership; and that from that time forward nobody was in possession of the vessel except the partners, or if the partners embrace more than the master and crew—it is not very clear how that is—she was in the possession of the master and crew for the partnership. The fact that by the contract it was provided that the trading should be under the control and instructions of an official of the Provisional Government does not seem to me to affect the possession of the vessel. It further appears that so far from the vessel being used for what may be regarded as any public purpose, the *Annette* loaded tar for Liverpool—conceivably that may be Government export from Archangel—

and was then to load pitch from Liverpool for Spain, and then salt from Spain for Iceland. I will mention now, while I am upon it, that in the case of the *Dora* the facts are very similar. She also loaded tar for Liverpool, and then was to load salt for Iceland, and fish from Iceland to Fleetwood.

The conclusion I have arrived at is that the parties moving have wholly failed to make out that the *Annette* is in the possession of the Provisional Government, even if the Provisional Government is to be regarded as a sovereign state. She is in the possession of Mr. Sloka, the master, or possibly of Mr. Sloka and the rest of the crew; and the real question to be litigated is one as to the right of possession between the plaintiff, who is admitted to be owner, and the master, who is in fact in possession, claiming the right of possession under contract with the Provisional Government, but still claiming to be entitled to possession.

There is no question that in such a dispute, though the vessel is a foreign vessel, and though the parties are foreigners, the Court has jurisdiction. That cannot be questioned. It always had jurisdiction, as I understand, in actions of possession, and by the Admiralty Court Act, 1840, it acquired jurisdiction to investigate questions of title. The long-continued practice, however, was for the Court to decline to exercise jurisdiction where the action was an action of possession in respect of a foreign vessel, and the claimants were both foreigners. But to that practice there was this exception—that the Court, though loth to exercise jurisdiction, might be induced to exercise jurisdiction if the parties consented or if the representative of the foreign state to which the vessel belonged requested it. In some of the earlier decisions, notably in *The Johan and Siegmund* (1) Sir Wm. Scott used language which would indicate that both these conditions had to be fulfilled—the consent of the parties and the request of the accredited agent of the country to which they belonged. But it is clear from later decisions—see, for example, *The See Reuter* (2)—that Lord Stowell would have exercised jurisdiction notwithstanding an objection by one of the parties, if he was

(1) (1810) Edw. 242. (2) 1 Dods. 22.

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satisfied that he had the consent of the foreign state, and in that case he inferred consent from the fact that judgment had been given by a Court of the foreign country, and he was only enforcing that judgment by exercising jurisdiction over the ship in this country. The same principle was applied in *The Evangelistria*. (1) In each of these cases there was a decree of the foreign Court from which assent was inferred. The point is the assent of the foreign state, disregarding the assent or the absence of assent of the parties.

Here, as far as the *Annette* goes, it is sufficient to say that the plaintiff is supported by his own Government, the Esthonian Government, which is the Government of the port of registry of the vessel. This therefore is the exceptional case in which, even under the old decisions, the Court would exercise jurisdiction—namely, a foreign vessel and foreign disputants, with a request by the Government of the country of the vessel to this Court to exercise jurisdiction. I therefore see no reason why I should decline to exercise jurisdiction in the case of the *Annette*, and I accordingly dismiss the motion.

With regard to the *Dora*, the facts are almost identical except in one particular. The *Dora* is registered at Riga. The owner, Mr. Jacob Markson, is an Esthonian subject living in Esthonia. Otherwise the position is the same, except that the affidavit to lead the warrant says that Paul Purrin and others wrongfully took possession of the vessel. Mr. Purrin is the master, so that in the *Dora* Mr. Purrin takes the place of Mr. Sloka in the *Annette*. All that I have said about the Provisional Government of Northern Russia and possession applies equally to the case of the *Dora*. It is equally the case in the *Dora* that the vessel is a foreign vessel, that the disputants, in my view, are the owner and the master or the master and the rest of the crew. Ought I to decline to exercise jurisdiction because the vessel is registered at Riga, the owner being an Esthonian, and the Esthonian Government in his case also, asks the Court to entertain the action ?

I cannot help thinking that the cases to which I have referred are somewhat out of date. They proceed upon the

(1) (1876) 2 P. D. 241, n.

principle that this Court cannot properly consider questions of the municipal law of foreign countries, and that the possession and ownership of a vessel must depend upon the municipal law of the flag. In more modern times it is quite a common thing for other Courts to have to determine questions involving a consideration of the municipal law of foreign countries, which are tried on evidence as to what that law is. Anyone who has practised in the Commercial Court must be quite familiar with questions of that kind being investigated, and I see no greater difficulty in regard to a vessel than I do as to anything else. This Court itself is frequently bound to consider questions of foreign law, in wages, bottomry, or mortgage actions, where the Court will entertain a suit against a foreign vessel.

The matter seems to me to be one of discretion, and the reasons for exercising the discretion by refusing to entertain a suit seem to me much less strong in modern days than they were in the days of Lord Stowell, and less strong than they were even in the days of Sir Robert Phillimore. When I find that this vessel is owned admittedly by an Esthonian, and the Court is invited by the Esthonian Government to entertain jurisdiction, and when I find that there is no evidence, or that it has not been shown to me that there is any evidence, of any other Government which would have an interest in the matter ; and when, also, I am left in doubt as to whether there are Courts at Riga or what the Government there is, I think I ought to exercise my discretion by holding that I will entertain this action also.

The motion in the case of the *Dora* will therefore also be dismissed. I, of course, decide nothing about the final rights of the parties. I am merely determining whether this is a case in which I ought at this stage to set aside the service of the writs, and I decide that I ought not.

The motions in both cases are dismissed with costs.

Solicitors for the plaintiffs : *W. A. Crump & Son.*
Solicitors for the defendants : *Ince, Colt, Ince & Roscoe.*

E. C. T.

1919
Feb. 21.

ADMIRALTY.

THE HASSEL.

[1918 S. 11.]

Admiralty—Collision—Pilot Vessel—Lights—"Pilot vessels engaged on their Station"—Regulations for preventing Collisions at Sea, art. 8.

A pilot cutter, proceeding out from Barry dock to put a pilot on board a vessel which had signalled for a pilot, was carrying at her masthead the "all-round" white light as provided in art. 8 of the Regulations for Preventing Collisions at Sea for pilot vessels "engaged on their station on pilotage duty." On the approach of the defendants' steamship she did not show or flash her sidelights as provided by the same article, and she was run into and sunk off the entrance to the breakwaters:—

Held, that although on pilotage duty she was not engaged on her station on pilotage duty, and her obligation, therefore, was to carry lights similar to those of other vessels of her tonnage: that the exhibition of the all-round light and nothing else was misleading; and that the defendants were not negligent in not picking up the light among the number of others off the entrance soon enough to avoid the collision.

Action of Damage by Collision.

The plaintiffs were the owners of the pilot cutter *Shamrock* and her master and crew proceeding for their lost effects; the defendants were the owners of the Norwegian steamship *Hassel*. The collision took place off the entrance to Barry docks on the evening of January 25, 1918.

The facts, which are fully stated in the judgment, shortly were that when the pilot cutter, which had her sails set, but as there was little or no wind was being propelled by oars, was proceeding out to a vessel which had signalled for a pilot, she was run down and sunk by the *Hassel*, which was coming in. The pilot cutter was exhibiting at her masthead an all-round white light which those on the *Hassel* only picked up among the other white lights near the entrance at a distance of about 300 yards. The defendants alleged, inter alia, that the *Shamrock* failed to exhibit lights in accordance with art. 8 of the Regulations for Preventing Collisions at Sea. The provisions of this article and the arguments thereon are set out in the judgment.

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THE HASSEL.

Lewis Noad and *R. F. Hayward* for the plaintiffs.
Laing K.C. and *Dumas* for the defendants.

HILL J. This is a claim by the owner of the pilot cutter *Shamrock* and the master and crew, proceeding for their lost effects, against the owners of the steamship *Hassel*, to recover damages for the sinking of the *Shamrock* at the entrance to Barry on the evening of January 25, 1918.

The *Shamrock* is a cutter of 51 ft. in length. There is no evidence as to her exact tonnage. She carried a crew of three and three pilots. The *Hassel* was a steamship of 3968 tons gross and 356 ft. long. She had a part cargo and was in charge of a pilot. The *Shamrock* was coming out from Barry and the *Hassel* was proceeding in for dock. It was a fine, clear, moonlight night. The tide was 1½ hours ebb. In between the breakwaters at the mouth of the entrance channel the tide would be slack, but just outside, on that state of the tide, it would, across the entrance, be of a force of between two and three knots.

The *Shamrock* had been lying inside the west breakwater and was proceeding out to put a Newport pilot on board a steamer which had signalled for such a pilot. She carried at her masthead an all-round white light. She had a red and green combination light lit, but it was never exhibited. She had sail set, but there was hardly any wind, and she was being worked out with the help of sweeps at a very slow speed.

The *Hassel*, which was showing regulation lights and also docking lights, had been dodging about outside waiting for the signal to indicate that she could enter dock—the exhibition of a green light on the end of the jetty. A steamer passed down coming out, and then the docking signal was displayed and the *Hassel* turned and headed for the entrance, N.W. and then N.W. by N. She had a tug ahead and another astern.

The plaintiffs' case was that the *Shamrock* was between the breakwaters or a little outside of them, and well on the west side of that passage, when the masthead and red lights of the *Hassel* were seen about a quarter of a mile away and a little abaft the port beam, the *Shamrock* heading about S.W.; and

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that the *Hassel* came on and when within a length or two of the *Shamrock* opened her green light and ran into the cutter.

The defendants' case is that the *Hassel* was waiting, as I have said, for the docking signal, and that after the outward-bound steamer had passed down, the docking signal was displayed, and she proceeded towards the entrance with her engines working at slow and stop, and got on to a N.W. by N. heading, and then saw at $1\frac{1}{2}$ cables' distance a white light, which was the all-round masthead light of the *Shamrock*, and, very shortly afterwards, the sails of the *Shamrock*. The *Shamrock* was then in the middle of the entrance between the breakwaters, a little on the port bow of the *Hassel*. Upon that the helm was hard-a-ported and the engines given a touch ahead, and the bow tug was ordered to pull to the eastward and the stern tug was ordered to hold up the stern of the *Hassel* also to the eastward; but the tide, which was setting across just outside the entrance, had such an effect on the *Hassel* that it carried her to the westward on to the *Shamrock* before the *Hassel* had time to carry out her intended manœuvre of getting her head to the eastward and passing under the stern of the *Shamrock*. The pilot said he could not starboard to counteract the effect of the tide because of the presence of the *Shamrock*, and he could not go astern because it was too late —the *Hassel* was too far in; if he had attempted to do so the tide would have set the *Hassel* down on to the breakwater. He further said that if he had known of the *Shamrock* earlier he could have gone astern.

I find that the collision was in the line across the ends of the breakwaters, or possibly a little outside that line. I find that the collision happened as the defendants say it happened, not by any starboarding of the *Hassel*—there was none—and not by the stern tug of the *Hassel* pulling the stern to the eastward against the tide, and throwing the *Hassel's* head to the westward, but by the tide setting her to the westward and preventing her turning sharply enough to avoid the *Shamrock*. I am advised that when the *Shamrock* was seen, the pilot was quite right not to go astern; it was too dangerous, having regard to the tide. I am also advised that when the

Hassel saw the *Shamrock* there was nothing which the *Hassel* could properly be called upon to do which would have prevented the collision. Upon that advice I find at that time, and from that time forward, there was no negligence on the part of the *Hassel*.

Had the *Hassel* been aware that the *Shamrock* was in the channel at a time when the *Hassel* was considerably further out, the *Hassel* could, by going astern, have avoided the collision, and, in my view, therefore could and ought to have gone astern had she been aware of the position of the *Shamrock*. The question therefore is whether the *Hassel* at such earlier time ought to have been aware that the *Shamrock* was proceeding out through the channel. Now, it must be remembered that the *Shamrock* was moving very slowly indeed —those on board of her say at about a knot. She had only got such movement as her sweeps gave her. She was showing an all-round white light and nothing else. In my opinion, she was carrying an improper light, a light which, in the circumstances, was a misleading light. I do not think the carrying of that light can be justified under any regulation. Counsel for the plaintiffs argued that the *Shamrock* was "engaged on her station on pilotage duty" within art. 8 of the Regulations for Preventing Collisions at Sea, and therefore the light she had to carry was "a white light at the masthead, visible all round the horizon." But if she was on her station on pilotage duty, then according to art. 8 she "shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed 15 minutes." That she certainly was not doing. Moreover, when pilot vessels are engaged on their station on pilotage duty:—"On the near approach of or to other vessels, they shall have their side lights lighted, ready for use, and shall flash or show them at short intervals to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side." That also the *Shamrock* certainly did not do.

I think the *Shamrock* was not on her station. I daresay

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she was on pilotage duty, because she was going out to put a pilot on board a ship. But it seems to me to be straining it very much to say that from the moment she got under way from inside the west breakwater she was on her station. But even if she was, and was justified in carrying her all-round white light, she must carry out the rest of the obligations which attach to pilot vessels in such a position—namely, to show a flare-up light or lights at short intervals, and to exhibit her side lights on the near approach of or to other vessels.

On the other hand, if, as I think, she was not engaged on her station on pilotage duty her obligation was to "carry lights similar to those of other vessels of her tonnage." I do not know what her precise tonnage was. She either came within art. 5 or art. 6 or art. 7 (3.). If she was under 20 tons she came within art. 7 (3.). Therefore she either had to carry side lights under art. 5 or exhibit them under art. 6 or, under art. 7 (3.), if she was a vessel "under oars or sails of less than 20 tons," her obligation was to "have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side."

In such a position, for the *Shamrock* to carry a single all-round white light was not only against the regulations, but was most misleading.

But whether there was a breach of the regulations or not, the question still remains, having regard to the fact that the *Shamrock* carried this all-round white light and nothing else, and exhibited nothing else, whether those on board the *Hassel* ought to have seen it sooner, and, having seen it, appreciated that it was the light of a vessel under way and proceeding down to the entrance.

There were, as one might anticipate, many lights—white lights—being exhibited to the northward of the entrance, and the *Shamrock*, as I have said, was proceeding very slowly. I am advised, and I entirely agree, that there was no negligence in those on board the *Hassel* in not sooner picking out

the white light of the *Shamrock* from the stationary lights, or in not sooner appreciating that the white light was that of a vessel under way and coming down to the entrance. I therefore find that there was no negligence on the part of the *Hassel*, and, so finding, it is unnecessary to determine whether the *Shamrock* got under way before or after the docking signal was displayed. It is admitted that it would be wrong for her to get under way after the docking signal was displayed. Nor is it necessary to determine whether even if the *Shamrock* got under way before the docking signal was displayed, it was proper to continue down the channel when the *Hassel* was seen to be coming up; or, in other words, though actually being propelled by oars, whether the *Shamrock* was not within the by-law which forbids vessels lying or remaining in the course of the traffic. I need not determine that.

The facts which I have already found make it clear that the plaintiffs have made out no case of negligence against those in charge of the *Hassel*. Therefore there must be judgment for the defendants.

Solicitors for the plaintiffs: *Gamlen, Bowerman and Forward for Hunter & White, Newport, Mon.*

Solicitor for the defendants: *Gilbert Robertson, Cardiff.*

E. C. T.

1919
Mar. 17.

ADMIRALTY.

THE CUPICA.

[1916 fol. 771.]

Admiralty—Collision—Underway Lights—Motor auxiliary Barque—Vessel under Sail—Additional Speed by mechanical Propulsion—Regulations for preventing Collisions at Sea, arts. 2, 20.

The plaintiffs' steamship and the defendants' motor auxiliary barque came into collision in the English Channel. The barque was under sail. There was not much wind, and she was using her starboard motor to act, as alleged by the defendants, merely as a leeboard; but in the opinion of the Court this gave her some additional speed. She was exhibiting the lights required to be carried by a sailing vessel under way:—

Held, that it was misleading to treat herself, by her lights, as a sailing vessel, and that in addition to the regulation side lights she ought to have carried the masthead light which art. 2 of the Regulations for Preventing Collisions at Sea requires to be carried by a steamship under way.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Angelica Mœrsk;* the defendants and counter-claimants were the owners of the barque *Cupica.*

The collision took place about 10 P.M. on November 22, 1916, in the English Channel. The weather was fine and clear and the tide ebb. The wind, according to the plaintiffs, was W.S.W. a moderate breeze; and, according to the defendants, N.W. light.

According to the statement of claim, the *Angelica Mœrsk,* a screw steamship of 1405 tons gross, of the port of Copenhagen, was bound from the Tyne to Bilbao with a cargo of coal, manned by a crew of eighteen hands. She was on a course of W.S.W. magnetic, making about eight knots, when the loom of the sails of the *Cupica,* which was showing no lights, was seen about half a ship's length away bearing about four points on the port bow. The helm was at once ordered hard-a-port and the telegraph to the engines was rung to stop; but before anything could be done the *Cupica* with her stem struck the *Angelica Mœrsk* on the port bow, doing her so much damage that she had to be beached.

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The plaintiffs alleged, inter alia, that the *Cupica* failed to exhibit the proper or any lights.

According to the defence and counterclaim, the *Cupica*, a steel motor auxiliary barque of 1240 tons gross, belonging to Glasgow, bound from Philadelphia to London with cargo, was proceeding under part sail heading about N.E. by E. $\frac{1}{4}$ E., making about three knots. Her port motor engine had broken down, but she was working her starboard motor to act as a lee board. The regulation side and stern lights for a sailing vessel were duly exhibited and burning brightly. In these circumstances those on board her sighted the masthead and green lights of the *Angelica Mœrsk*, distant about two miles, and bearing about $1\frac{1}{2}$ points on the starboard bow. The *Cupica* kept her course and the *Angelica Mœrsk* approached, momentarily opening her red light and closing it in again, and drew nearer, showing only her green light on the starboard bow of the *Cupica*. Shortly afterwards the *Angelica Mœrsk*, when a short distance off and well on the starboard bow, again opened her red light, showing both side lights; the helm of the *Cupica* was put hard-a-starboard to try to ease the blow, but the collision occurred almost immediately. The defendants alleged, inter alia, that, as a steamship, it was the duty of the *Angelica Mœrsk*, under art. 20 of the Regulations for Preventing Collisions at Sea, to keep clear of the *Cupica*, a sailing ship, and that she failed to do so.

It was argued on behalf of the plaintiffs that the *Cupica* when using her motor was really in the position of a steamship, and that under art. 2 of the Regulations she ought to have exhibited a masthead light. The evidence of the master of the *Cupica* on this point was that when the two motors were being used the masthead light was exhibited because the ship then made more progress, but that the one motor gave her no way at all, and that she was entirely dependent on the sails.

Bateson K.C. and *Dumas* for the plaintiffs.
Laing K.C. and *D. Stephens* for the defendants.

ROCHE J. In this case, on November 22, 1916, at about

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10 P.M., the Danish steamship *Angelica Mærsk* and the American motor auxiliary barque *Cupica* were in collision in the neighbourhood of the Folkestone Gateway, in the English Channel.

The case for the *Angelica Mærsk* is that she was to the eastward of the gateway, proceeding on the appropriate course to pass through the gateway on her starboard or northerly side; that she was approaching the gateway, but still some little distance to the eastward, when the *Cupica*, bearing no lights, suddenly came into view about half a length away—i.e., 100 to 150 ft. off—and came into collision with her, the stem of the *Cupica* striking the port bow of the *Angelica Mærsk*. It is said that not only was the *Cupica* wrong in carrying no lights, but that she must have starboarded and come across from the other side of the gateway after she had passed through on that side, or that she was always on the wrong side of the channel in and connected with the gateway. The case of the *Angelica Mærsk*, therefore, is that the collision was to the northward of the gateway, and also considerably to the eastward of it.

The *Cupica's* case is that the collision was in the gateway; that she was passing through on the appropriate course, to pass on the south side of the channel, that she had just braced her yards for a change of wind setting in a more northerly direction; and that when she was so doing the *Angelica Mærsk*, acting under port helm, and shaping a course from the south side, came into collision with her. The *Cupica's* case with regard to her lights is that she was carrying the appropriate side and stern lights, but was not carrying a masthead light because, although she had one of her two motors still working, and to an extent effectively working, she was not really under steam or under mechanical propulsion, but was substantially a sailing ship.

The plaintiffs, in my view of the evidence, are accurate as regards the place of the collision; that is to say, it was well to the northward of the channel, and was quite a substantial distance to the eastward of the gateway. On the other broad issue of fact I find that the *Cupica* had side lights exhibited,

and that they were reasonably effective lights, and ought to have been seen by the *Angelica Mærsk* at a sufficient distance if a proper lookout had been kept. I will deal later with the question of what lights the *Cupica* ought to have carried.

As to the courses of the vessels, I find that until a short time before the collision the *Angelica Mærsk* was proceeding down on a steady course to pass through the gateway to the northward, and that she did not change her course till quite a short time before the collision. As to the *Cupica*, on the other hand, I am satisfied that as she passed through the gateway, or shortly afterwards, she made a very substantial change of course in order to go in a more northerly direction, and get closer inshore. This change was not a mere trimming of the sails and yards to the wind, as I am satisfied that the wind did not shift round to the northward, but, on the contrary, was shifting, if anything, to the southward; it was a change accompanied by helm action, and was a considerable change of course to the northward. That, joined with the fact that the alteration was taken and adopted at a time when the *Cupica* had not noticed or observed the *Angelica Mærsk*, was a substantial cause of the collision.

I now come to the question as to whether the *Cupica* ought to have been carrying lights other than those she was in fact exhibiting. I am advised by the Elder Brethren that, considering the additional speed which we are satisfied was obtained by means of the mechanical propulsion coming up channel, the *Cupica* was a vessel under mechanical propulsion, and that it was misleading to treat herself, by her lights, as a sailing ship. That matter is perhaps of rather less importance than it otherwise might be, because even if the *Cupica* were a sailing ship, having regard to my finding that she made a substantial change of course at the time and place I have found, I should find that that was not a change of course which a sailing vessel ought to have taken; that it was bad seamanship when other vessels showing lights were coming down; and that it was not an urgent change of course which, in my judgment, was consistent with good seamanship. As it was, inasmuch as the *Cupica* had the

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power of manœuvring with her engines, it was doubly wrong, because it was a manœuvre which took her across the entrance to a narrow channel, and it was a direct breach of art. 25 (the narrow channel rule).

The result is that I find the *Cupica* to blame for a bad lookout, for not exhibiting a masthead light, and for altering her course, and so altering whether she is to be regarded as a steamship or a sailing ship. With regard to the absence of a masthead light, of course it is said that the *Angelica Mærsk* did not notice those lights that the *Cupica* showed, and therefore the question of the masthead light is immaterial to the case. I do not, however, accept that view, because the masthead light is the most conspicuous light, and it does not follow that if one light is missed the other would be missed, particularly a masthead light.

I also find the *Angelica Mærsk* to blame. She had a bad lookout. I do not propose to give in any detail my reasons for finding that the *Cupica* had satisfactory or sufficiently satisfactory side lights. I see no reason at all why she should not have had, and I accept the evidence that she had such lights. I disregard the suggestion that she was trying to dodge the patrol vessels, and was attempting to run through without lights, because the fact is that she had a conspicuous stern light. It is quite true that her green light may have looked dim, but I am satisfied that it was a satisfactory green light, and it ought to have been seen. It follows that the *Angelica Mærsk* is to blame for not having a good lookout. I think that probably, in spite of the bad lookout, the *Angelica Mærsk* did see the *Cupica* at a greater distance than she alleges she did see her; and that she then ported. That porting, taking place at half a length's distance, would have very little to do with the collision, but such action taken at an earlier stage, as I think it was, was not wise action, and probably would never have been taken if there had been a really good lookout, which would have enabled the *Angelica Mærsk* to be aware of the *Cupica* at a really substantial distance.

I am satisfied that not only did the *Cupica* change her course under starboard helm, but that there was some alteration

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by the *Angelica Mærsk* under port helm. Therefore, for a bad lookout and also for porting, I hold the *Angelica Mærsk* to blame.

I see no reason in this case for making any distinction in the proportions of blame, and I therefore pronounce both vessels to blame for the collision in equal degrees.

Solicitors for the plaintiffs : *Thomas Cooper & Co.*
Solicitors for the defendants : *Botterell & Roche.*

E. C. T.

[IN PRIZE.]

1919

Mar. 10.

THE FROGNER.

[1915 No. 530.]

Prize Court—Right to appear as Claimants—Property in Goods not in Claimants at Date of Seizure.

Although the date of seizure is the date at which the status of goods seized as prize must be determined, apart from such questions as may arise as regards enemy property or the doctrine of infection, it is not necessary for persons claiming goods in the Prize Court to have the property in them at the date of seizure; if they have the property in the goods at the date of the claim and at the time of the hearing they are entitled to assert their claim.

ACTION for condemnation as prize of 1000 tierces of lard.

Under bills of lading dated February 8, 1915, 1000 tierces of lard (conditional contraband) were shipped by Armour & Company of Chicago on board the Norwegian steamship *Frogner*, consigned to Anton C. Herskind & Company, merchants of Copenhagen. The goods were seized by the Collector of Customs at Kirkwall on March 18, 1915. On March 23 Messrs. Herskind & Company paid for the goods. On July 9 an appearance was entered on behalf of Messrs. Herskind & Company in respect of 800 of the tierces, and on September 20, 1916, a claim was filed. No claim was made at any time to the remaining 200 tierces.

The case for the Crown was first, that the 200 tierces being

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unclaimed it must be presumed that they had an enemy destination, and, therefore, that the 800 tierces were liable to condemnation under the doctrine of infection; secondly, that Messrs. Herskind & Company, not being the owners of the goods at the time of seizure, had no right to appear as claimants. The case is reported on the latter point only.

Sir Gordon Hewart A.-G. and *Bruce Thomas* (*Sir Ernest Pollock S.-G.* with them) for the Procurator-General.

Sir Erle Richards K.C. and *L. F. C. Darby* for the claimants.

THE PRESIDENT (LORD STERNDALE): In this case the Crown claims condemnation of two consignments of 800 and 200 tierces of lard shipped by Messrs. Armour & Company —the very well known firm of meat packers in Chicago— to the claimants, Messrs. Anton C. Herskind & Company. The claim as regards the 800 is put upon these grounds—that the 200 tierces shipped by the same shipper to the same consignee and upon the same ship are contraband; that the property in the 800 tierces had not passed from the shippers to the consignees; that the same shippers were owners of 200 tierces which were contraband; and that, therefore, the 800 are infected by them, and must be condemned because they are the property of the same owners. The second ground is that if the claim for infection fails, they must be condemned on the ground that the proper claimants are not before the Court; that the property not having passed to Messrs. Anton C. Herskind & Company at the date of seizure, they have no right to claim in this court; and, therefore, there being no claim, that it ought to be presumed that the goods are contraband. The second ground is obviously a rather technical one.

[The learned President then dealt with the facts and decided that, although unclaimed, the evidence for the Crown itself established that the 200 tierces were not confiscable as contraband, and therefore that the question of infection did not arise. His Lordship continued as follows:]

I have now to deal with the second ground. The property did not pass from the sellers to Messrs. Herskind, the

purchasers, until March 23, which was some five days after the seizure. It is said, therefore, that Messrs. Herskind are not the proper claimants, and have no right to appear as claimants, because the property had not passed to them at the time of seizure. There is, no doubt, a dictum of the late learned President to which I was referred in *The Hilding* (1), to the effect that where the property had not passed the claim would be disallowed. I have not had an opportunity of reading through the whole of the facts in that case, nor am I sure that it is not complicated by the question of enemy property. I think there are other dicta, or statements, by the late learned President to the same effect. If these dicta be correct the claimants in this case cannot claim because they had not got the property in the goods at the date of seizure. The persons who would have the property in the goods under these circumstances would be Armour & Company, the shippers. It seems, so far as I can understand *The Prinz Adalbert* (2), to be quite clearly decided by the Privy Council that if the shipper has the property in the goods at the time of seizure, but he has not got it at the time of adjudication, and at the time of the claim, he cannot claim and cannot assert his right to the property in the Prize Court. I am told that the point has been raised several times and has not been decided although there are dicta on it, but I think it well to give my judgment at once upon it and leave it to be decided by the Privy Council, if necessary.

The result of the Crown's contention would be—and I cannot see that it would be a right conclusion—that goods might be brought into this court and condemnation asked for and no ground of condemnation shown. Nobody could claim—the shipper could not claim, according to the authority of *The Prinz Adalbert* (2), because he had not got the property at the time that he brought his claim before the Court. The consignee could not claim because he had not got the property at the date of seizure. The date of seizure is undoubtedly the date at which the position, or status—if I may call it so—of the goods must be determined. But apart from any question of enemy

(1) Unreported. (2) [1917] A. C. 586.

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property—which does not arise in this case—I cannot think that under any circumstances goods which are not liable to condemnation at all would be obliged to remain in the hands of the Crown because the shipper, not having the property in them at the date of making the claim, could not claim, nor could the consignee purchaser because he had not the property in them at the date of seizure. That seems to me to give rise to an impossible position, and forming the best opinion I can upon it I arrive at the conclusion that the person having the property in the goods at the time he comes into court to assert his claim to them is the person who is entitled to claim, and that it is not an answer to him to say that the property had passed to him only after the date of seizure. I wish, however, to guard myself by saying that I only arrive at that conclusion apart from such questions as might arise as regards enemy property or possible infection. In the latter case it might very well be said that the goods were infected at the date of seizure and could not be disinfected by passing the property in them subsequently. But apart from any question of that sort, in a simple case such as this, in my opinion the person having the property at the time of claim is the person entitled to come and assert it before this Court. He, of course, must assert it subject to those other questions that I have mentioned which might arise. But in circumstances like the present I think he is entitled to assert his claim, and therefore I decide that the goods must be released to the claimants in this case.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the claimants: *Thomas Cooper & Co.*

E. C. T.

[IN THE COURT OF APPEAL.]

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Mar. 12, 13, 14, 17.

IN THE ESTATE OF BARLOW, DECEASED.

HAYDON *v.* PRING.

Probate—Practice—Costs—Jurisdiction—Co-Plaintiffs—Executors propounding Will—Will obtained by undue Influence of One Co-Plaintiff—Will pronounced against—Costs of innocent Co-Plaintiff.

In an action in the Probate Division two co-plaintiffs propounded a will and codicil of a testatrix of which they were executors. The execution of the will and codicil was found to have been obtained by the undue influence of one of the plaintiffs and a nurse, who both benefited largely under the will, the other plaintiff being exonerated from all blame. The Court pronounced against the will and codicil and declared in favour of an earlier will propounded by the defendant, and ordered that the costs of the innocent plaintiff should be paid out of the testatrix's estate, and that the other plaintiff should pay to the defendant the costs of the action including the costs to be paid to the innocent plaintiff out of the testatrix's estate which the defendant represented. On appeal by the plaintiffs on the merits:—

Held, that the appeal must be dismissed, but that the order as to costs in the court below was wrong and ought not to have been made; that as the co-plaintiffs had failed in their action the proper course was to dismiss it with costs; and that that order must now be made.

Decision of Horridge J. ante 14 affirmed on the merits but order as to costs varied.

APPEAL from a decision of Horridge J. (1)

In this action the two co-plaintiffs, C. J. Haydon, a solicitor, and Dr. W. H. Fawcett, a doctor, propounded, as executors, a will of Clara Jane Barlow dated April 30, 1917, with a codicil. The defendant, the Rev. R. H. Pring, who was the executor of, and a beneficiary under, an earlier will, dated July 15, 1914, pleaded that the propounded will and codicil (1.) were not duly executed; (2.) that the testatrix was not of sound mind at the time of execution; (3.) that she did not approve of the contents; (4.) that the execution of the will and codicil was obtained by the undue influence of the plaintiff Fawcett and a nurse, who both benefited largely under the will.

After three days' trial, Horridge J. decided against the defendant on the first three pleas, but in his favour on the

(1) Ante, 14.

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plea of undue influence. The will and codicil propounded were pronounced against, and the earlier will established.

The judge also found that the plaintiff Haydon had acted throughout with care and propriety, and that he was bound to propound the will of which he was one of the executors, but he reserved the question of costs. The question of costs was subsequently argued, and the judge, in a considered judgment, ordered that the costs of the plaintiff Haydon should be paid out of the testatrix's estate, and that the plaintiff Fawcett should pay to the defendant the costs of the action, including the costs to be paid to the plaintiff Haydon out of the testatrix's estate which the defendant represented.

The plaintiffs appealed.

Holman Gregory K.C. and *Cotes-Preedy* for the appellants.

Rigby Swift K.C. and *G. C. Tynedale* (*Darnley Clifton* with them) for the respondent.

SWINFEN EADY M.R. after dealing with the appeal on its merits and holding that it must be dismissed, continued: The only other question is as to costs. In the court below the costs were dealt with by giving the plaintiff Haydon, the co-executor of the plaintiff Fawcett, his costs out of the estate of Mrs. Barlow and then ordering the plaintiff Fawcett to pay the defendant Pring his costs including the costs of the plaintiff Haydon paid out of the testatrix's estate. That is an order which, in my judgment, ought not to have been made. The plaintiffs propounded a will which they failed to establish as being the will of Mrs. Barlow. That being so they had failed in the action and should pay the costs. It is not a case in which the plaintiff Haydon is entitled by contract to his costs out of the estate because he is not in fact an executor as the will propounded by him was not established. The proper order therefore is to dismiss the action with costs. It has been urged that, as the plaintiff Haydon was named as executor in the will of 1917 and was not implicated in obtaining its execution by undue influence, he ought to have his costs. But he was under no obligation to propound the

will; he could have stood aside and left the plaintiff Fawcett to establish it, and, if necessary, he could have been made a defendant to the plaintiff Fawcett's action. As it is he has joined as co-plaintiff with the plaintiff Fawcett in seeking to prove a will which is established as not being the will of Mrs. Barlow, and the proper order is for the plaintiffs to pay the costs.

The appeal must be dismissed with costs and the order as to costs in the court below must be varied and the proper order made that the plaintiffs do pay the costs of the action.

SCRUTTON L.J. and EVE J. gave judgment to the same effect dismissing the appeal on the merits and concurring on the question of costs.

Appeal dismissed but order as to costs varied.

Solicitors for appellants: *Peacock & Goddard for Mooring, Aldridge & Haydon, Bournemouth.*

Solicitors for respondent: *Lewis & Sons.*

W. I. C.

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Mar. 11.

[IN THE CHANCERY COURT OF YORK.]

APPEAL FROM CONSISTORY COURT OF CARLISLE.

In re ST. PAUL'S, CARLISLE.

Ecclesiastical Law—Faculty—Painted Window—Historical Representation of the Crucifixion of Our Saviour—War Memorial—Discretion.

A faculty was granted for the insertion in the centre compartment of the east window of a parish church of a representation in stained glass of the Crucifixion of Our Saviour, with the figure of the Virgin Mary in one side compartment of the window and of St. John in the other side compartment: the representation being of a historical nature and one to which having regard to the services in the church and other circumstances there would be no likelihood that superstitious reverence would be paid.

The vicar and churchwardens of a parish church in the diocese of Carlisle, with the unanimous consent of the vestry of the parish, applied to the Ordinary for a faculty authorizing them to insert in the central compartment of the east window of the church—a window of three lower compartments divided by stone mullions—an historical representation of the Crucifixion of Our Saviour with the arms of the figure on the cross carried from the centre compartment into the compartments on either side, and in one of these side compartments a figure of the Virgin Mary and in the other side compartment the figure of St. John, the window to have in it the following inscription: "To the glory of God and in memory of the men of this parish and church who gave their lives for King and Country in the Great War, 1914— " Evidence was given to show that if the faculty was granted there would be no likelihood of superstitious reverence being paid to the window or to the representation proposed to be inserted therein. The Ordinary dismissed the application, holding the representation to be apart from its questionable legality unsuitable and inappropriate for a war memorial. Against this decision the promovents appealed to the Chancery Court of York. The official Principal of the Chancery Court of York, being of opinion that no question arose as to the legality of the representation in stained glass of the Crucifixion with the accompanying figures and inscription, and that the Ordinary had in refusing the application exercised a wrong discretion, allowed the appeal, and retaining the cause decreed the issue of the faculty applied for.

On the 15th of August last a monition with intimation issued out of the registry of the Consistory Court of Carlisle, admonishing the patron, the vicar, and the parishioners of the parish church of St. Paul's, Carlisle, in special and all others in

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general to appear before the Chancellor of the diocese of Carlisle and show cause why a faculty should not be issued to the vicar and churchwardens of the church of St. Paul's, Carlisle, to take out the glass then in the east window of the church and in lieu thereof insert stained glass with the inscription :—

> "To the glory of God and in memory of the men of this parish and church who gave their lives for King and Country in the Great War 1914— "

and to make certain other alterations in the church not material to this report.

A design for the window was brought in by the promovents and showed that it was proposed that there should be inserted in the central compartment of the window—a window of three lower compartments divided by stone mullions—a representation in stained glass of the Crucifixion of Our Saviour, with in one of the side compartments a figure of the Virgin Mary and in the other side compartment a figure of St. John.

On the 27th of August last the application for the faculty came on to be heard before the Chancellor of the diocese of Carlisle (the Venerable E. P. Prescott, D.D.), who granted a faculty for the alterations asked for other than the alteration proposed in respect of the east window of the church, and so far as related to that alteration adjourned the application for further information, intimating that he considered that the figure designed to be in the central compartment would be an isolated figure and practically a crucifix, and was attenuated and in accordance with mediæval and not early Christian representations of the Crucifixion.

Subsequently an amended design for the proposed window and representation was filed on behalf of the promovents, which differed from the original design in that in the amended design the outstretched arms of the figure on the cross were carried through into the side compartments of the window and the figure itself was altered so as not to be attenuated or of mediæval design.

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Nov. 19, 1918. The adjourned application was heard at Carlisle before the Chancellor of the diocese of Carlisle.

The vicar of St. Paul's, Carlisle (the Rev. W. S. Gardner), was called as a witness in support of the application, and gave the following evidence.

I have been vicar of St. Paul's, Carlisle, for the last two and one-half years; this matter has been before the vestry of the parish and there has been no opposition at all, as appears by a resolution passed on the 1st of August last without any objection on the part of any member of the congregation. The central compartment of the window according to the designs is a figure of Our Saviour on the Cross, the figure on the right is intended to be the Virgin Mary, and on the left St. John. I claim that that is an accurate historical representation of the Crucifixion of Our Saviour as recorded by St. John in his Gospel, ch. xix., v. 26. I have never received any intimation from the Bishop of the diocese with regard to any alteration to be made in the services at St. Paul's, Carlisle, nor any complaints in respect of such services. They have always been such as were authorized by law. No crucifix is in the church and no vestments or copes are worn or incense used. Similar windows are to be seen in Holy Trinity, Carlisle, and in many other churches in the diocese. The use of the word church in the inscription would refer to members of the congregation non-parishioners who would wish to be associated with the church they attend.

It was contended by the proctor for the promovents in support of the application that by the amended design it was intended to meet the objections of the Chancellor, and as amended the figure in the central compartment of the window was not attenuated or of mediæval design, and not isolated, the arms of the figure being extended into the side compartments; that it was neither in theory nor in fact a crucifix, and that the proposed window in stained glass could lawfully be placed in the church inasmuch as it was an historical representation of the Crucifixion of Our Saviour, to which there was no likelihood that superstitious reverence would be paid. A painted window involves decoration and nothing else, and

differs from a rood or other images in relief in wood or stone.

No opponent appeared.

THE CHANCELLOR delivered judgment as follows:— This is an application by the vicar and churchwardens of St. Paul's, Carlisle, for a faculty to place stained glass in the east window of that church. The design submitted represents Our Blessed Lord upon the Cross. The figure, about six feet high, is to occupy the whole of the central compartment of the window. It is thus isolated—is in fact a crucifix. I think the observations with regard to the position of the hands are beside the point. There is also a figure in each of the side compartments. Thus it would form the representation of a mediæval rood projected on the window; this, though not showing much originality, was probably intended by the artist. Anyhow it is sailing rather near the wind.

The Court is not prepared to enter into all the arguments as to the legality of the crucifix. They have been discussed for days and days in the higher courts and the results have not been very definite or very satisfactory. In the well-known case of *Liddell* v. *Westerton* (1) the Privy Council though giving judgment on the legality of the cross as a decoration yet pointed out the great distinction between crosses and crucifixes, and that the use of the former might well be permitted while the other was forbidden.

In *Ridsdale* v. *Clifton* (2) the Lord Chancellor referring to *Liddell* v. *Westerton* (1) said there was a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix, "the former having been used as a symbol of Christianity two or three centuries before either crucifixes or images were introduced." Then quoting the learned judge in the Arches Court, he said: "It is no doubt easy to say, what proof is there of danger of idolatry now? What facts are there to point to a probability of abuse? But when the Court is dealing with a well-known sacred

(1) Moore's Special Report (1857).
(2) (1876) 1 P. D. 316; (1877) 2 P. D. 276, 351.

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object—an object enjoined and put up by authority in all the churches of England before the Reformation, in a particular part of the church and for the particular purpose of 'adoration'—when the Court finds that the same object, both in the church and out of it, is still worshipped by those who adhere to the unreformed Romish faith; and when it is told that now, after the lapse of three hundred years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' In these observations of the learned judge their Lordships concur; and they select them as the grounds of his decision which commend themselves to their judgment." (1) In that particular church therefore where there were other serious illegalities they decided that the crucifix should be removed and no such faculty issued. I am surprised that this decision was not referred to by the proctor appearing in support of the application. Thus the use of the crucifix as a decoration in the abstract was left indeterminate, and it is left to the discretion of the Consistory Court to decide whether, in the case before it, the crucifix is a suitable decoration.

There are many cases where the crucifix is not an isolated figure but part of an artistic group, or forming part "of the connected representation of an historical subject." Here no difficulty arises. In the famous Exeter reredos case *Phillpotts* v. *Boyd* (2) in 1875, the above principle was clearly held, although as it happened no figure of the cross or the Crucifix was involved.

Turning to the case before the Court, is this a suitable subject for a war memorial and would it be appropriate to place it as a decoration immediately above the Holy Table in this Church? It must ever be a subject of controversy and of legal controversy. It is to be placed immediately above the Holy Table. From a religious point of view some far more suitable subject might

(1) *Ridsdale* v. *Clifton*, 2 P. D. 276, 352, 353.

(2) (1875) L. R. 6 P. C. 435, 466.

well have been selected. The minds of mourners might well have been directed to a higher plane, not to the Christ dead, and thus painfully pictured, but to Christ living, risen, glorified. The New Testament teems with passages where, while speaking of that mysterious death, the writer points upward to the Christ on high, ever living to make intercession for us. I have been unwilling to dwell on this aspect of the case, though much more might be said.

The church of St. Paul's, Carlisle, is a new church built only fifty years ago. It was built entirely by the efforts and generosity of the late Mr. Head, the late Dean Clare, and their personal friends. They obtained later from the Ecclesiastical Commissioners an additional one hundred pounds to the two hundred pounds' value of the living. Those who knew them can well conjecture what their feelings would have been had they thought that such a subject as this would have been introduced into the church. A new incumbent came about two years ago. He now applies for a faculty, and after consideration, the Court having been adjourned, presses this subject upon the Court. I am very far from thinking that there is now any danger of superstitious reverence in this church, but I do not feel justified in building on the basis of this opinion any conclusions, although this has been done in some Consistory Courts. This painful subject placed in a conspicuous part of a parish church, before a mixed congregation of men, women and children, would be offensive to some, distressing to others, and of doubtful profit to the rest. Therefore apart from the questionable legality, I mean legality under the special circumstances of the case, on the grounds that the subject is unsuitable and inappropriate this Court is of opinion that the faculty should not be granted.

Against this decision the promovents asserted an appeal to the Chancery Court of York.

An extract from the Act book of the Consistory Court of Carlisle which set forth the proceedings at the adjourned hearing there as above stated was transmitted to the registry for the purposes of the appeal.

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March 11, 1919. The appeal was heard before the Official Principal of the Chancery Court of York (Sir Lewis T. Dibdin, D.C.L.) (1)

A shorthand note of the evidence of the vicar of St. Paul's, Carlisle, given in the Court below verified by affidavit was allowed to be read.

Hansell appeared for the appellants and asked the Court to allow the appeal and retaining the cause to decree a faculty to issue for the proposed window in accordance with the amended design. The only known case directly in point with the present and showing that a representation in stained glass of the Crucifixion can legally be placed in a church is that of St. Margaret's, Westminster, where the window is still to be seen and the proceedings concerning which are shortly noticed in Rothery's Return of proceedings before the Delegates, No. 171, p. 85, nomine *Peirson* v. *Gell* (1762) (2), but according to the principles laid down in later cases the proposed window here is clearly a lawful decoration, the representation designed being an accurate historical representation of the Crucifixion of Our Saviour, and according to the evidence before the Court not likely to be abused by superstitious reverence. He referred to *Phillpotts* v. *Boyd* (3); *Clifton* v. *Ridsdale* (4); *Hughes* v. *Edwards* (5); and *In re St. Anselm, Pinner.* (6) The cases concerning roods and crucifixes and other images in relief in stone or wood have no application to designs in stained glass. The rood has a special history and different considerations apply to stained glass windows which, as in this case, apart from the question of a war memorial, are placed in churches for the purpose of decoration only. In dismissing the application the judge of the Court below exercised his discretion wrongly and the window as designed is not unsuitable for a war memorial.

(1) The Court sat in the Church House, Westminster.

(2) See as to this case: "The ornaments of churches considered with a particular view of the late decoration of the parish church of St. Margaret's, Westminster ed. 1761, 4to. Hole, William, Archdeacon of Barnstable."

(3) L. R. 6 P. C. 435, 466.

(4) 1 P. D. 316, 358; 2 P. D. 276, 352.

(5) (1877) 2 P. D. 361.

(6) [1901] P. 202.

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No person appeared for any respondent.

THE COURT delivered judgment as follows :—

This is an application for a faculty to fill an east window in the church of St. Paul's, Carlisle, with stained glass. The subject proposed to be delineated upon the glass is the Crucifixion of Our Saviour. The object of the window is a war memorial. The applicants are the vicar and churchwardens. There has been a vestry held before which the design for the window was exhibited. That vestry, attended I am told by twenty-five parishioners, was unanimously in favour of the application for a faculty. The matter came before the learned Chancellor of the diocese of Carlisle, and he refused to grant the faculty for reasons which he gave in a written judgment. Briefly they are two. First he doubts the legality of a stained glass window of this description. With regard to that he refers to the cases concerning roods, of which there are a good many and not altogether in agreement with one another. They raise questions of very great difficulty, but in my opinion they are quite beside the mark with reference to this case. It is impossible to say that figures delineated in a window have never been regarded with superstitious reverence, but it is quite certain that windows have not generally been used for purposes of devotion and there has never been so far as I am aware any difficulty with regard to portrayals of the Crucifixion in windows. Mr. Hansell in the course of his argument referred to *Clifton* v. *Ridsdale* (1) and *Hughes* v. *Edwards* (2), where the matter of painted windows is mentioned, and mentioned in that way. Though the question of superstitious reverence being paid to a window might conceivably arise the question is not nearly so likely to arise as in the case of the rood. I think the learned Chancellor has made a mistake in confusing the question before him of a stained glass window with the much more difficult case of a rood. In my view there is no question of legality with reference to this window.

The learned Chancellor's second ground is that as a matter

(1) 1 P. D. 316, 358; 2 P. D. 276, 352.

(2) (1877) 2 P. D. 361.

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of discretion he ought not to grant a faculty in this case. On questions of discretion this Court is very loath indeed to interfere with the discretion exercised by the Consistory Court, but I confess that in this case it appears to me impossible to regard the decision of the learned Chancellor as based upon any discretion which can be called a judicial discretion. The evidence he had before him is all in favour of the application. He himself appreciated the character of the evidence, because he says he is far from thinking that there is now any danger of superstitious reverence in this church. Well, these are the factors upon which a judicial discretion ought I think to have been exercised. Apparently the learned Chancellor is influenced by the facts of the locality no doubt known to himself as to the founder of the church, and by his views of what the founder's feelings would be at the present time. I need not say that any view as to what a man who is now dead would think of circumstances which have arisen now and which were not in existence when he was alive is always a matter of speculation and cannot be regarded so as to overrule the views of parishioners who are living to-day. These parishioners as I have said are in favour of the application, and I confess I can see no reason on the ground of discretion upon which the application can be refused. The result must be that the appeal will be allowed and the faculty granted. As I understand that the appellants wish the cause to be retained in this Court I am willing that that should be done. I will therefore retain the cause and grant the faculty. The faculty will be for the amended design, that design being the one preferred by the appellants.

Appeal allowed, faculty granted.

Solicitors for the appellants: *Speechly, Mumford & Craig for Saul & Lightfoot, Carlisle.*

C. F. J.

[IN THE CONSISTORY COURT OF LIVERPOOL.] 1919

In re THE NEW PARISH OF HAIGH WITH ASPULL. *Mar.* 21.

Ecclesiastical Law—Application to fix Burial and other Fees—New Parishes Acts, 1843 *and* 1856 (6 *&* 7 *Vict. c.* 37, *s.* 15; 19 *&* 20 *Vict. c.* 104)—*Distribution of Burial Fees.*

The Ordinary has jurisdiction in the case of a new parish to settle and approve the propriety of burial fees, although they may not be fees included in those which he has statutory power to fix.

The 15th section of the New Parishes Act, 1843, provides that it shall be lawful to solemnize in a new parish within that section marriages, baptisms, churchings and burials, and to require and receive such fees upon the solemnization of such offices or any of them as shall be fixed by the Chancellor of the diocese in which such parish shall be situate and which fees and also the fees for churchings to be received by the minister of such district such Chancellor is hereby empowered to fix.

On an application by the vicar and churchwardens of a new parish in the diocese of Liverpool within the above-mentioned section the Chancellor of that diocese fixed for the parish a table of fees containing all such fees as he was empowered and required to fix in pursuance of the above-mentioned section, and also confirmed the propriety of whatever fees contained in the table of fees were not included in fees which he was required to fix under the section.

The Chancellor ordered that a portion of the burial fees to be received in pursuance of the table of fees fixed by him should be allocated to form a fund for the maintenance and extension of the parish churchyard.

THIS was an application by the vicar and churchwardens of the new parish of Haigh with Aspull in the diocese of Liverpool for the approval and fixing of a table of fees. The application was heard on January 28, 1919, before the Chancellor of the diocese of Liverpool (H. C. Dowdall, Esq.), when the Rev. J. B. d'A. Willis, vicar, and Henry James Ashworth, one of the churchwardens, gave evidence; from which it appeared that there were no funds to keep the churchyard in proper order, nor for the extension of it, which would soon be necessary; that the soil of the churchyard was heavy and encumbered with boulders, that the population of the parish were miners, dyers, cotton weavers, and farm workers, wages being good and poverty rare. The nearest burial ground

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was that provided by the burial authority at Blackrod, where the fees, as shown by a table of them produced in court, were relatively high.

The parishioners of Haigh with Aspull preferred a churchyard to a provided ground, not only as being less expensive but also on account of its associations. The table of fees proposed had been discussed in the parish magazine and unanimously adopted by the vestry; it had been exhibited for two Sundays on the church door and all parties had been cited. Not only was there no opposition, but the witnesses had heard no word of adverse criticism, and believed that the proposal met with unanimous approval.

A proctor appeared on behalf of the applicants.

The application was unopposed.

Cur. adv. vult.

On March 21, 1919, judgment was delivered by the Chancellor of the diocese of Liverpool.

THE CHANCELLOR. There appears to be some uncertainty as to the law, and considerable variety of practice, as regards burial fees.

In ancient parishes it is the practice in this, and I believe in some other dioceses, not to intervene in any way, but to refer applicants to the Ecclesiastical Commissioners, who have statutory power under the Church Building Act, 1819 (59 Geo. 3, c. 134), "to make and fix any table of fees for any parish." This statutory power is, in the case of ancient parishes, the only statutory power by which fees may be "fixed" and become recoverable by reason of such fixing. I understand that the Ecclesiastical Commissioners in determining the fee payable to a sexton for digging graves have regard to the rate of wages obtaining in the neighbourhood, but that in regard to the more important fees they generally follow their printed standard very closely.

In new parishes application is made direct to the Chancellor of the diocese, or the applicants are referred by the Ecclesiastical Commissioners to him, to fix the fees payable upon the solemnization of marriages, churchings and burials under the

powers conferred on him by the New Parishes Acts, 1843 and 1856 (6 & 7 Vict. c. 37, s. 15; 19 & 20 Vict. c. 104, ss. 1, 2, 11). It is agreed that the jurisdiction of the Chancellor under these Acts extends to the fees payable to the minister, clerk and sexton for their services; but it is held in some dioceses, though not in others, that the Chancellor cannot fix the larger fees payable for monuments, etc., and that he has no jurisdiction except that conferred on him by the New Parishes Acts. In fact, there is much justification for the statement in Halsbury's Laws of England, vol. 3, tit. "Burials," s. 904 (p. 403), that "the law with regard to such fees is not clearly settled."

It is impossible to solve the problems thus presented without a somewhat careful review of the whole subject.

In the Middle Ages magnates made gifts of land to abbeys and were buried in abbeys. In course of time people who were less highly placed might endow chantries and be buried in sacred buildings. After the Reformation and until the middle of the nineteenth century burial in churches was common, but a substantial sum was paid for the privilege. As regards other people, they were buried in the churchyard without coffins, and the ground was used again and again, so that no extension of the churchyard was ever necessary. An ancient churchyard may be a small one although many thousands of burials may have taken place in it. Every parishioner had, and has, a legal right to be buried in this way, and for this use of the ground, and for the services of the clergy in performing the burial office, no fee was, or is, at common law recoverable in respect of such parishioner, unless it has become payable by the immemorial custom of the parish. See the *Bishop of St. David's* v. *Lucy*. (1) An immemorial custom does not mean a usage however uniform and certain which has only existed for a hundred years or so: *Spry* v. *Gallop*. (2) It means a custom which may be presumed to have existed in 1189 A.D., so that, having regard to the value of money at that time, it seems that nothing more than a few pence could be claimed by custom: *Bryant* v. *Foot*. (3)

(1) (1699) 1 Ld. Raym. 447, at p. 450.

(2) (1847) 16 M. & W. 716.

(3) (1867) L. R. 2 Q. B. 161.

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On the other hand, "where a license is necessary, the person giving it may stand upon his own price" (*Dean and Chapter of Exeter's Case* (1)), and inasmuch as the only common law right in respect of a parishioner "strictly taken" is the right "to be returned to his parent earth for dissolution" (*Gilbert* v. *Buzzard* (2)), and a non-parishioner has no rights at all, it follows that in every case of a non-parishioner, and in each case of a parishioner where it is desired that he should be buried in a particular place, or a tombstone or other monument erected, or, if we follow Lord Stowell's words (just cited) to their logical conclusion, even in case a coffin is used, a reasonable fee may be charged: *Winstanley* v. *North Manchester Overseers.* (3) And any reasonable agreement between the incumbent and the representatives of the deceased in regard to such matters may be enforced in the civil courts as a contract made upon good consideration: *Nevill* v. *Bridger.* (4)

Fees of variable amount are often payable for concessions made in this way. Thus in country churches there is often no published or recognized fee for memorial crosses, headstones, curbs and the like, and in such cases, although a cautious incumbent or executor might think it wise that nothing should be done until a definite agreement has been reached, it may very well happen that it is left to the incumbent to charge what he thinks reasonably proper, and that payment is made without question.

But in regard to matters of regular occurrence and uniform type it is natural that a uniform fee should become usual, and when it is usual, and published, and well known to everyone, and reasonable in amount (as to which the opinion of the Consistory Court is highly relevant), anyone who asks for the concession may be taken to agree to pay the usual fee. A table of fees is often exhibited which, so far as the parochial records go, has never been subject to discussion, but it is generally to be presumed that the amount of such fees has been debated and agreed between the incumbent and the parishioners, as the vestry minutes frequently show to have actually

(1) (1705) 1 Salk. 334.
(2) (1821) 2 Hagg. Cons. 333, 348.
(3) [1910] A. C. 7.
(4) (1874) L. R. 9 Ex. 214.

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been the case. But even when this has been done, the fees must be proper and reasonable, and the matter should be submitted to the Consistory Court for approval. In the words of Lord Stowell, then Sir William Scott, "The parishes are not left to carve for themselves in imposing these rates, they are all submitted to the examination of the Ordinary, who exercises his judgment and expresses the result by a confirmation of their propriety in terms of very guarded caution. It is perhaps not easy to say where the authority could be more properly lodged or more conveniently exercised": *Gilbert* v. *Buzzard*. (1)

Referring to this case Phillimore (Eccl. Law, 2nd ed., vol. 2, p. 1251) says, "In the diocese of London it seems that the Chancellor of the diocese may fix fees." But it will be noted that Lord Stowell, though sitting in the Consistory Court of the diocese of London, did not profess to be exercising any power peculiar to that Court, neither is it apparent how that Court could, apart from statute, have any jurisdiction in such a matter greater than that of any other Consistory Court. Moreover, Lord Stowell did not profess any more than his predecessors in the 17th century professed (see Spelman's Works, p. 184), to fix fees in the way that they may now be fixed under statute. And Dr. Lushington, one of the advocates in *Gilbert* v. *Buzzard* (2), without questioning the propriety of that decision, held that tables of fees confirmed by the Ordinary would not constitute legal fees: *Varty* v. *Nunn* (3) and *Spry* v. *St. Marylebone*. (4)

On the other hand the authority of Lord Stowell is beyond dispute; the case referred to was argued on both sides by the most eminent advocates of the day in July, 1820; judgment was not finally delivered till May, 1821, and from then till now, though the case has been quoted in recent judgments of the King's Bench Division and the Probate Division of the High Court of Justice and of the House of Lords, it has never been called in question. Neither can it be said that the statutory powers have affected the powers then exercised, for the Church

(1) 2 Hagg. Cons. 333, 356.
(2) 2 Hagg. Cons. 333.
(3) (1841) 2 Curt. 877, 898; affirmed, (1843) 3 Curt. 352, 2 Notes of Cases, 108.
(4) (1839) 2 Curt. 5, 12.

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Building Act of 1819 had already been passed, and was, of course, familiar to Lord Stowell.

I therefore hold that this Court possesses to-day the powers exercised by Lord Stowell in *Gilbert* v. *Buzzard*. (1)

Turning now to the statutes.

Sect. 11 of the Church Building Act, 1819, empowers the Ecclesiastical Commissioners (or rather their predecessors, the Church Building Commissioners: see 19 & 20 Vict. c. 55), "to make and fix any table of fees for any parish, ... and all fees so fixed may be sued for . . . . by the spiritual person, or clerk or sexton, to whom the same shall be assigned. . . . ." That is to say, the mere fact that fees have been fixed in the manner prescribed by the statute gives a statutory right of action for their recovery. The advantages of this procedure are so obvious that it is naturally resorted to.

The other statute, or rather statutes, the New Parishes Acts, 1843 and 1856, relate only to new parishes and new parish churches. The operative words, in s. 15 of the Act of 1843, which were enacted very soon after Dr. Lushington's judgments in *Spry* v. *St. Marylebone* (2) and *Varty* v. *Nunn* (3) are as follows: "it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages, baptisms, churchings and burials, and to require and receive such fees upon the solemnization of such offices or any of them as shall be fixed by the Chancellor of the diocese in which such new parish shall be situate, and which fees, and also the fees for churchings to be received as aforesaid by the minister of such district, such Chancellor is hereby empowered and required to fix accordingly."

It is, I believe, universally held that the fees payable to a sexton for digging a grave are fees payable "upon the solemnization" of a burial, within the meaning of the section; but whether fees payable in respect of the grave or its embellishment come within the meaning of the section is a matter upon which opinion is divided. In many new parishes it is fees of this debated character which are the most important, and after all the necessary discussion and procedure is complete, and

(1) 2 Hagg. Cons. 333.
(2) (1839) 2 Curt. 5, 12.
(3) (1841) 2 Curt. 877, 898; affirmed, (1843) 3 Curt. 352, 2 Notes of Cases, 108.

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all the evidence heard in the Consistory Court for the purpose of fixing the former fees, it appears unreasonable that the parish should be put to the expense of applying to the Ecclesiastical Commissioners to fix the latter. It is worth noticing that the opinion of Lord Stowell quoted above (that it is not easy to say where the authority for confirming the propriety of such fees could be more properly lodged or more conveniently exercised than in the Consistory Court) was expressed about a year after the Church Building Act, 1819, was passed, and considering the weight of his authority, it may be that the New Parishes Act was intended to give effect to his opinion. Even if this surmise were a fact it would, of course, be irrelevant; for the words of the section must speak for themselves.

The question is not discussed either in Phillimore's Ecclesiastical Law, who in vol. 2 on p. 1251, 2nd ed., merely quotes the words of the statute without comment, neither is the question discussed in Halsbury's Laws of England, though the wording of note (*p.*), vol. 11, s. 1414 (p. 712), suggests that the scope of the Chancellor's powers in new parishes does not differ from that of the Ecclesiastical Commissioners in ancient parishes.

Speaking for myself, I observe that the word "solemnization" is not applied in the prayer-book either to baptisms, churchings, or burials, but only to matrimony, and I infer that it is not used in the present context with such precision as to exclude any fee payable to an officer of the church in respect of a burial. By common consent it includes more than "surplice fees," unless the sexton's fee for digging can be so described, and it is not easy to see where to stop except at the point I have indicated. In any case, I propose, quantum in nobis est, to deal with all the matters brought before me. In so far as they are fees which I am, by the New Parishes Act, 1843, "empowered and required to fix," they will be fixed in pursuance of those powers; if any of them are not included within those powers then I "confirm their propriety" under the non-statutory authority exercised in *Gilbert* v. *Buzzard.* (1)

I do not know exactly when the practice arose or became

(1) 2 Hagg. Cons. 333.

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common of appropriating portions of the churchyard to particular families in a way which has become usually effective though not legally binding, I mean by the use of headstones or flatstones or the construction of brick graves. There is no indication of the practice in the table of fees, dated 1628, given in Spelman's Works, p. 185, where the only distinction in churchyard burials is between those which are coffined and those which are not, a double fee being charged in the former case. But tombstones, at all events from the later years of the 17th century, are common enough. The practice must always involve the licence of the incumbent, and the effect of it is frequently to render an extension of the churchyard necessary. Inasmuch as the ecclesiastical law on this subject is not generally familiar, it should be observed that, subject to his duty to permit his parishioners "to be returned to their parent earth for dissolution" in such place as he appoints, the freehold right of the incumbent can only be limited either by faculty—e.g., a faculty vault—or by the incumbent permitting the construction or erection of that which cannot be removed without a faculty—e.g., a brick grave or a tombstone. In the latter case, however, the incumbent may still permit or order the burial of a complete stranger in a brick grave or under a tombstone, in which, or under which, are the remains of someone else's father or mother; and he cannot prevent his successor from doing so. But in fact this is not done, and so long as a special fee is payable for burials in such graves it is not only contrary to usage, but against the interest of the incumbent that it should be done. It follows that he who is allowed, for instance, to build a brick grave in a churchyard without a faculty has no title such as he would have if he had a faculty grave, nor such as he would have if he bought a grave in a burial-ground provided by a public authority; but for practical purposes his action is hardly less conducive to the necessity for churchyard extension. The same is true, though perhaps not quite to the same extent, in every case where burial takes place in a grave over which a headstone, flatstone, or other monument is erected; and it is therefore not unreasonable that special fees should be paid when a

new grave is opened or reopened on a site where monuments, other than small wood or iron crosses, are permitted. For, "In populous parishes, where funerals are very frequent, the expense of keeping churchyards in an orderly and seemly condition, is not small, and that of purchasing new ones, when the old ones become surcharged, is extremely oppressive. To answer such charges both certain and contingent, it surely is not unreasonable that the actual use should contribute when it is called for." (1) It is indeed true that when Lord Stowell spoke these words the parish was under legal obligation to extend the churchyard when necessary, but inasmuch as they had power, which has been since lost, to raise a compulsory rate for the purpose, the considerations enunciated by him are even more urgent than they were. It is an element of strength in the national character that many Englishmen pay respect to the memory of their fathers and are glad when they go to church that this memory should be revived. And I once heard a Colonial Cabinet Minister say that to many of his fellow-citizens England was the home country because of its churchyards. The growth of towns and the closing of town churchyards make it the more important that the churchyards still in use should, when practicable, be maintained and as occasion arises enlarged, and that facilities for this purpose should be regarded with favour. And it is here perhaps not irrelevant to say that, when cremation has taken place, the ashes may be interred in a churchyard, although it has been closed or never been used for the burial of bodies, or they may, under a faculty, be deposited in a casket or urn in the floor or wall of a church, provided that the fabric of the church is not disturbed or rather endangered: *In re Kerr*. (2)

The only other question with which I have to deal is the distribution of the fees. By custom a portion of the burial fees may be payable to churchwardens: *Littlewood* v. *Williams* (3) and *Waring* v. *Griffiths*. (4)

Lord Stowell in the case to which I so often have referred (*Gilbert* v. *Buzzard* (5)), sanctioned the distribution of fees

(1) 2 Hagg. Cons. 333, 355, 356.
(2) [1894] P. 284.
(3) (1815) 6 Taunt. 277, 281.
(4) (1758) 1 Burr. 440.
(5) Hagg. Cons. at p. 364.

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between the incumbent and churchwardens, and said that this was a domestic concern as to which those using the churchyard had no right to be heard. My predecessor, Chancellor Espin, whose judgments command respect beyond the limits of this diocese, allowed an apportionment of burial fees to a warden's churchyard extension fund, and I shall therefore, in accordance with the wishes of the vicar, approve the allocation of a portion of the fees to a fund for the maintenance and extension of the churchyard.

Solicitors for the applicants : *Tyrer, Kenion, Simpson & Co., Liverpool.*

C. F. J.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION.] 1919

HOOPER *v.* HOOPER. *March* 31.

Restitution of Conjugal Rights—Non-compliance with Order—Periodical Payments—Payments secured by Deed—Power to vary—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *ss.* 2, 4.

In a case in which the Court has made an order directing a husband to make periodical payments to his wife on his failure to comply with an order for restitution of conjugal rights, and has ordered him to secure such payments by deed, any deed executed by the parties in obedience to that order must be regarded as part of the order, and the Court has the same power to vary the deed as it has to vary the order.

In this case the wife, on October 13, 1915, obtained an order against her husband for restitution of conjugal rights, which he disobeyed.

In November, 1915, the wife presented a petition for periodical payments under s. 2 of the Matrimonial Causes Act, 1884. It was proved that the husband had an income from investments of 206*l.* a year, and that he had until shortly before the petition been earning 190*l.* a year as art master at a school, but was then unemployed. The wife had no income.

On March 13, 1916, the Court made an order that the husband should pay his wife 90*l.* a year, and should secure the same by deed, which, in default of agreement, should be settled by the conveyancing counsel to the Court.

A deed was agreed on and executed by the parties on August 11, 1916, under which the husband transferred all his securities to the Public Trustee upon trust to pay 90*l.* a year to his wife out of the income, and to pay the rest of the income to himself.

In April, 1917, the wife's father died leaving her, for her life, property which produced 700*l.* a year. The husband was still unemployed and his income had not materially altered. There were no children of the marriage.

On September 16, 1917, the husband presented a petition under the above Act asking that the order of March 13, 1916,

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might be discharged and the deed cancelled. The matter was referred to the Registrar who reported on January 10, 1919, that the order directing payment to the wife of 90*l.* a year should be temporarily suspended and that she should have her costs.

The husband now moved to vary the report by directing that all the interest of the wife under the said order, or any document executed in pursuance thereof, should be suspended, and that the Public Trustee should retransfer to the husband all the securities and property comprised in the deed. The wife opposed. The question depended on the construction of the Matrimonial Causes Act, 1884, s. 4. (1)

Disturnal K.C. and *Le Bas* for the husband. The Court has power under the Act of 1884, s. 4, to vary the amount of the periodical payments ordered to be made under that Act. The circumstances in this case have been entirely changed by the fact that the wife has succeeded to a comparatively large income. The Registrar has reported that the payments to the wife should be temporarily suspended ; but the change of circumstances is final, and we submit that the order should be discharged altogether. It is suggested that the Court cannot vary the deed which has been settled and executed, but the deed is only part of the order and can be varied with it. *Tangye* v. *Tangye* (2) establishes the practice on that point. [They were stopped by the Court.]

W. O. Willis for the wife. The Court has no power to vary the order after it has been embodied in a deed executed by the parties. Any application to alter the deed must be made to the Chancery Division : *Bradley* v. *Bradley*. (3) In *Tangye* v. *Tangye* (2) no deed had been executed. The Court has only power to vary the order in the four ways mentioned

(1) 47 & 48 Vict. c. 68, s. 4 : "The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just."

(2) [1914] P. 201.

(3) (1882) 7 P. D. 237.

in s. 4 of the Act, namely, by altering the times of payment, increasing or diminishing the amount, or temporarily suspending the payment. None of these ways include what the husband asks for.

LORD COLERIDGE J. In this case the wife in a suit for restitution of conjugal rights, obtained an order for restitution, and on the husband's non-compliance obtained an order for the payment by her husband of 90*l.* a year and that a deed should be drawn up embodying the terms.

The circumstances of the parties have since altered. The wife has come into a comparatively large income and the husband's income has diminished. It became manifestly unfair that under those circumstances the husband should have to continue to pay this 90*l.* a year to his wife. Thereupon he applies to this Court under s. 4 of the Matrimonial Causes Act, 1884, to vary the deed that was entered into to secure the moneys payable under the order, by suspending the payment of the 90*l.*

Obviously that ought to be done; the only question is whether it can be done, and whether the parties having entered into this deed this Court can suspend its operation.

The Court in making this order made it subject to the provisions of s. 4, that is, subject to variation from time to time as regards periodical payments of money by altering the times of payment, increasing or diminishing the amount, or temporarily suspending the payment. No question arises as to the order being made subject to s. 4, and indeed it could not be made otherwise.

The deed which was ordered to be entered into was to secure the order of the Court, to secure therefore the order of the Court made subject to the provisions of s. 4, and if it did not so secure the order of the Court it did not carry the order into effect. The deed is silent as to variation or alteration. But it seems to me clear that the deed, being part of the order, was made subject to s. 4; that is to say, it was made subject to the Court being able to alter it at any time. If the parties had put into the deed by agreement clauses which were not

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part of the order but which they themselves had agreed upon, this Court would not interfere with the proper arrangement entered into by deed between the parties. It can only alter, vary or suspend such a deed where such a deed is inconsistent with the order which the deed is to secure. Now here it is quite clear to my mind that this deed, if it is not to be altered, deprives the Court of the jurisdiction which it had. The Court could never have made such an order as that without depriving itself of its own jurisdiction, which no Court can do. Therefore it appears to be quite clear that on the question of payments, their periods, their times, their increase or diminishment or suspension—any of those matters that require the deed to be altered to carry into effect the order of this Court—the Court can act, and therefore I uphold the decision of the Registrar, and I suspend until further order the operation of the deed with regard to the payment of the 90*l.*, and I grant the wife her costs in accordance with the express view of the Registrar. The trustee must, until further order, pay the income of the property transferred to him by the deed to the husband.

Solicitors for the husband : *Bartlett & Gregory.*
Solicitors for the wife : *Flower & Nussey.*

J. R. B.

[IN PRIZE.]

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April 1, 2.

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[1916 No. 1094.]

Prize Court—Neutral Vessel—Enemy Ownership—"Fleet auxiliary"—Unneutral Service—Transfer after Outbreak of War—Validity—Declaration of London, 1909, *art.* 56.

On the outbreak of war with Germany, a vessel registered as a Mexican vessel and nominally owned by a Mexican Company, but actually owned and controlled by a German subject, was flying the German flag in order to avoid being requisitioned by one or other of the contending factions in Mexico. On her next voyage, which began on August 23, 1914, she sailed under the Mexican flag with coal and other goods intended for the German cruiser *Leipzig*, and eventually, after the coal had been discharged into lighters, it was put on board the *Leipzig*. The vessel was then requisitioned for upwards of twelve months, first by the followers of Carranza and then by the followers of Villa, and was eventually sold bona fide to the claimants, a San Francisco firm. In January, 1916, she was captured by a British cruiser, and her condemnation was sought on the ground, inter alia, that the sale was invalid and that she must be regarded as an enemy vessel.

By art. 56 of the Declaration of London, 1909, "the transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed":—

Held, first, that assuming the vessel was to be regarded as an enemy vessel at the outbreak of war, the claimants had established that the transfer to them was bona fide; and that although the result of the transfer was that the consequences to which an enemy vessel, as such, was exposed, no longer attached to her, the transfer was not made with that object and was valid. Secondly, that although possibly a belligerent ship of war could not be transferred to a neutral during war time, the vessel could not be regarded as an auxiliary to the German Navy by reason of her having shipped coal intended for the *Leipzig*; and that there must be an order for her release.

ACTION for the condemnation of the steamship *Edna* as an enemy vessel or alternatively as a neutral vessel engaged in unneutral service.

The *Edna*, formerly the *Mazatlan*, a steamship of 1783 tons gross, was captured by H.M.S. *Newcastle* on January 27, 1916, in the South Atlantic, and taken to the Falkland Islands, where proceedings in prize were instituted against her. On

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April 1, 1916, the proceedings were transferred to the High Court of Justice. On July 3 a claim was filed on behalf of Messrs. Sudden & Christenson, of San Francisco, who had bought the vessel, then called the *Mazatlan*, in October, 1915, and had obtained American registry for her in November, 1915. The previous history of the vessel and the facts on which the Crown asked for her condemnation are summarized in the headnote and are fully set out in the judgment.

March 31, April 1, 2. *Sir Gordon Hewart A.-G.*, *Sir Ernest Pollock S.-G.*, and *D. Stephens* for the Procurator-General. If the vessel is to be regarded as a neutral vessel, it is admitted that, on the authority of *The Alwina* (1), not having been seized in delicto she cannot be condemned merely on the ground of carrying contraband intended for the German fleet. But this case goes much further. The *Mazatlan* as she then was set out with the express purpose of meeting the *Leipzig*, and was attempting to communicate with the *Leipzig*. Further, it is submitted that the vessel must be regarded as enemy property or as an auxiliary to the German fleet. At the outbreak of war she was not only flying the German flag but was in fact owned by a German. A vessel must be regarded as of the nationality of the flag which she flies (*The Vrow Elizabeth* (2)); and the actual and not the nominal ownership must be regarded: *The St. Tudno* (3); *The Proton*. (4)

Assuming, therefore, that at the outbreak of war she was an enemy vessel the transfer to the claimants, although bona fide, if recognized would deprive the belligerent of his right of capture and is void under art. 56 of the Declaration of London, which, while it does not prohibit all transfers after the outbreak of war—e.g., transfers by inheritance—would render void a transfer for the purpose of avoiding the consequences which might fall on the vessel if she retained her nationality. Further, by reason of her having shipped coal and other goods intended for the German cruiser *Leipzig*,

(1) [1918] A. C. 444.
(2) (1803) 5 C. Rob. 2.
(3) [1916] P. 291.
(4) [1918] A. C. 578.

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the *Edna* should be regarded as an auxiliary to the German fleet and therefore classed as a ship of war. An auxiliary does not mean an integral part of the fleet nor need she be a commissioned vessel. See Diplomatic Correspondence between the German Ambassador in Washington and Mr. Lansing, Under-Secretary of State for the United States, with reference to the internment of the *Locksun*, a supply ship for the German sloop *Geier* (Supp. to American Journal of Int.Law, vol. ix., pp. 243 et seq.). If an auxiliary, that character would remain, and as a ship of war she could not be transferred: *The Minerva.* (1) See also *The Georgia.* (2)

Sir Erle Richards K.C. and *Le Quesne* for the claimants. The *Edna* was never a public vessel employed in the service of the German fleet. The fact that in the course of one voyage she had on board coal intended for a German cruiser does not constitute her an auxiliary; nor does such conduct render her liable to confiscation unless caught in delicto: *The Alwina.* (3) The incidents which took place during that voyage cannot render void a bona fide transfer even if the Court should be of opinion that the vessel should be regarded as an enemy vessel at the time of the transfer. But at that date, although subsequently denounced, art. 57 of the Declaration of London, which provides that the nationality of the ship is to be decided by the flag, was in force. Therefore the claimants were entitled to treat the vessel as of Mexican nationality. Under the old law a bona fide purchase by a neutral would have been valid: *The Baltica* (4), and art. 56 of the Declaration of London merely puts the onus upon claimants of establishing the bona fides of the transfer.

The claimants are entitled to the return of their vessel, compensation for loss of profit and for wear and tear, and also some reward for the use of the vessel by the Crown who have made a profit out of her.

Sir Ernest Pollock S.-G. in reply. There was reasonable ground for the seizure, and it follows that the Crown in any event is not liable in damages. The "compensation" sought to be recovered is in fact damages under another name.

(1) (1807) 6 C. Rob. 396.
(2) (1868) 7 Wall. 32.
(3) [1918] A. C. 444.
(4) (1857) 11 Moo. P. C. 141.

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THE PRESIDENT (LORD STERNDALE): In this case the Crown ask for the condemnation of a ship now called the *Edna*. She was originally a Norwegian ship called the *Jason*. Then she was bought by a company to which I shall have to refer later, and was called the *Mazatlan*; and as the *Mazatlan* she continued for some time until she was bought by the present claimants, Messrs. Sudden & Christenson, a firm in San Francisco, when she was renamed the *Edna*. The vessel had been bought some time in the early part of 1914 by a company called the Lloyd Mexicano Société Anonyme, and that company really consisted of one person, a German named F. Jebsen, a captain in the German Naval Reserve. I think there were one or two other nominal shareholders, but he held substantially all the shares, and he really was the company. I suppose the ship was on the Norwegian registry before she was bought by that company. She was transferred to the Mexican registry, and she flew the Mexican flag. She sailed on a voyage which lasted from March 14, 1914, to May 14, 1914. She went north from San Francisco for lumber, back to San Francisco, and then made a voyage to Mexican ports and back. The next voyage is said to have begun on or about May 14, and continued to August 3, 1914. During that voyage, when she got to San Pedro, the port of Los Angelos, a curious transaction, which I do not yet altogether understand, took place. At that time there was a good deal of trouble in Mexico. The Carranzaists and the Villaists were engaged in hostilities with one another, and there was a question whether there would not be trouble between Mexico and the United States. It is said that for that reason the owners of the ship decided to transfer her to the German registry, and to put her under the German flag—the reason being that if they put her under a neutral flag neither of the contending factions in Mexico would requisition her, whereas if she continued under the Mexican flag, as I suppose both of them called themselves the Mexican Government, either of them might requisition her. The owners meant first to transfer her to the American flag, but they were not able to do that in consequence of the American law of registration. What

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they did was to get a document from the German Consul at San Pedro which allowed them temporarily—I will not say to register the ship, but to put on the ship the name of a port of registry which was German, and to fly the German flag. They painted out the words "La Paz," the Mexican port of registry, and painted in "Hamburg," and put her under the German flag. I have not seen that document. It is said, on the one hand, that it was for one voyage only. On the other hand, it is said that it was to enable the owners to fly the German flag for as long as it was convenient to them; and I will adopt that as being correct. Undoubtedly she never was registered as a German ship, and undoubtedly on the evidence before me her Mexican registry was never affected; and I cannot see that the transaction can have the slightest effect upon the ownership of the vessel. At that time war had not broken out. If a state of war had existed, and she had been met by a British ship whilst carrying the German flag, it might have been difficult for her to deny her German nationality. But nothing of that kind happened, and in the transaction itself I can see nothing that alters the ownership of the vessel. I do not think it altered her registry; but at any rate it did not, in my opinion, alter her ownership. She still continued owned by this Mexican company, which was in fact Jebsen. She got back on August 3, 1914; she left on her next voyage on August 23. In the meantime, war had broken out between England and Germany; and I will take it—and I think it is the fact—that she had not restored herself to her Mexican character; that is to say, she had not painted out the word "Hamburg" and painted in the words "La Paz," nor had she hoisted the Mexican flag till after the outbreak of war. Therefore I will take it that she was, whether rightly or wrongly, flying the German flag in the harbour of San Francisco at the outbreak of war.

She sailed on her next voyage, under the Mexican flag, on August 23, 1914, and the voyage continued until October 2, 1914. As before, she went north and loaded some timber. She also loaded a general cargo, and then she shipped some coal, and she shipped it in such a way that it could be

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got out without disturbing the rest of the cargo. She took on board a gentleman of the name Traub, who was a German wireless operator, who had been trained on the Telefunken system, and therefore was not familiar with the Marconi system which was fitted on board this vessel. In the course of her voyage she also took on board some other persons—a Captain Zur-Helle and his wife, and also another lady, and at one time somebody connected with the German Naval Service. Further, some packages which contained gun sights, and perhaps other things useful for a ship of war, were also shipped. The packages were marked "Remington typewriters." The wireless operator who was already on board was a gentleman named Duncan Smith, and he seems to have behaved with great resource and great courage throughout the voyage. The chief officer was a gentleman of the name of Walters, who seems to have done the same. He had refused to serve in the ship while she was under the German flag; he had rejoined her together with the cook (who had also refused to serve), when she came under the Mexican flag again. Traub was shipped because it was supposed that Mr. Duncan Smith would not work the wireless installation as Jebsen (who came on board the ship also) wished him to do.

I have no doubt whatever that the coal, and the other things I have mentioned, were shipped for the purpose of being put on board the German cruiser *Leipzig*. I entirely accept Mr. Smith's evidence that he was asked to communicate with the *Leipzig*, and keep in touch with her from the time they came within range of her. What he did, however, was to put the wireless installation out of order in such a way that it would not communicate with the *Leipzig*. Only one person could be in the wireless operating room at a time, and so he was able to appear to produce the spark, and to appear to Jebsen and Captain Paulsen, the master, as though he were trying to communicate with the *Leipzig* and could not get an answer. In that way he prevented complete touch being kept with the *Leipzig*, as had been intended. But they did meet in Ballenas Bay, and there Jebsen and the other German officer went on board the *Leipzig* with one of the ladies, and it is

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said that some of the packages were transhipped to the *Leipzig*. Coal was not passed to her there. I have no doubt that the intention was that those things and the coal should be put on board the *Leipzig*, and I think that the story told by the captain and some of the others on board the ship, of this visit in Ballenas Bay being a mere matter of courtesy, when they went on board the *Leipzig* as a morning call and took some fresh fruit with them, is untrue. I cannot think that they ever thought anyone would believe it, and I do not know why it was considered worth while to file such affidavits. After that the vessel went on to Guaymas. At Guaymas the coal was discharged into lighters, and I have no doubt that what Mr. Smith says he was told on the voyage back to San Francisco—namely, that the *Leipzig* had got the coal—is absolutely true. As I have said, I do not believe a word of the story told to the contrary, and I do not believe a word of the story told by the so-called agents at Guaymas, who say that the coal was landed there. Afterwards the vessel continued her voyage, discharged the remainder of her cargo, and returned to San Francisco. She arrived back in San Francisco, as I have said, on October 2, 1914. She went another voyage under the Mexican flag, which lasted from October 14, 1914, to October 8, 1915, and the reason that that voyage lasted so long was that during it she was requisitioned by the Carranzaists, the followers of Carranza in Mexico, and she carried troops for them. Then, unfortunately, she fell into the hands of the Villaists; they kept her, and they would not let her go until they got a consideration for doing so, of 15,000 dollars, in October, 1915. In October and November, 1915, she was on a voyage along the coast for her present owners, the claimants, who had bought her in a way I will describe presently. On November 7, 1915, she was chartered to W. R. Grace & Co., and on that voyage she was captured by H.M.S *Newcastle*. The question now is whether she ought to be condemned.

That is her history, apart from her passing into the possession of those who now claim her. That matter seems to have originated in January, 1915, when correspondence

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took place between a Captain Rinder—who had been in the White Star service, but was carrying on business at San Francisco as a marine surveyor and shipbroker—and Mr. Jebsen, with the result that on February 15, 1915, an agreement was made by the Lloyd Mexicano Co. for the sale of the ship to a company called the Executive Co. But she was still in the hands of the Mexicans, and the owners were indebted in an overdraft to their bankers. Their bankers were represented by a Mr. Wilson. The owners also wanted an advance for the purpose of getting the ship free. The result was that she was transferred to Mr. Wilson on April 5, really to secure the money owing by the owners to the bank; and also, if possible, to get her an American registry. For reasons which I do not really think it necessary to inquire into, Mr. Wilson transferred her to a company called the West Pacific Steamship Co. But he really was that company; it only had, I think, 50 dollars capital, and it was merely representing Mr. Wilson. It was supposed to be able to facilitate matters, perhaps in regard to the registry, and also to make matters easier in the case of his death. On September 23, 1915, the *Mazatlan* was released, and sailed for San Francisco. On October 1 the claimants bought her at a price of 125,000 dollars—a price which left a profit of 10,000 dollars to the Executive Co., which had got the contract on February 15. The money was paid by three cheques; one of 114,000 dollars was paid to Mr. Wilson, one of 10,000 dollars to the Executive Co., as representing their profit, and 1000 dollars was paid also to the Executive Co. for some money that had been deposited. Three bills of sale were given, one from the Lloyd Mexicano to the Western Pacific Steamship Co., one from that company to the Executive Co., and one from the Executive Co. to the claimants.

The first question is, was that a real transaction? I have not the least doubt that it was, and indeed it is not seriously contended by the Crown that it was not. I think that there is nothing whatever to cast any doubt upon the fact that the claimants honestly bought this ship for their own purposes and paid for her. Of course, they had other persons who

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were interested in her—persons who took so many shares in the ship, as people carrying on business as the claimants do generally have. But I am perfectly satisfied that it was a real, genuine transaction, and a real, genuine transfer.

The only question that remains is this: Was there anything to prevent the claimants getting a title? The first point that is made is that this ship was an auxiliary vessel—not a part of the German Navy, but an "auxiliary," what is sometimes called a "fleet auxiliary." Therefore, it is said, she was in the position of a ship of war, and could not be transferred during wartime. I will assume—I think it is probably correct, but I do not wish to pronounce any positive opinion about it—that a ship of war cannot be transferred during wartime. Was this ship anything of that kind? In my opinion there is absolutely no evidence that she was. I have to decide the case on the evidence that is before me; evidence from the persons most concerned is not obtainable. Mr. Jebsen, I am told, went down in a German submarine; Captain Zur-Helle, who went on board her during this voyage, afterwards went on board the *Leipzig*, and went down in her, and therefore I can get no information from them. They lost their lives in serving their country, and I see nothing to be said against either of them. But on the evidence that I have, the facts are these. As an ordinary merchant ship under the Mexican flag, owned, I will assume, by Germans, although nominally owned by a Mexican company, the *Mazatlan* was doing her ordinary business of trading about the coast. But her owner, knowing that there was a German cruiser, or several German cruisers, about, got intimation that one of these cruisers, the *Leipzig*, required coal. He also got intimation that certain other things, and certain persons, were to be put on board the *Leipzig*, and, I should think, got information as to the sort of neighbourhood in which the *Leipzig* was likely to be spoken if they got an opportunity of speaking her. So he loaded the coal, and the other things, took the passengers on board, and gave orders to the wireless telegraphist to get in touch, if he could, with the *Leipzig*, and to keep in touch until they arrived at a place where the coal could

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be transferred. It has been argued that that makes her an auxiliary, and I have an affidavit of Sir Reginald Hall, who was at that time the head of the Intelligence Department at the Admiralty, to say that arrangements were being made by the Germans to have fleet auxiliaries on that coast. He does not tell me what a "fleet auxiliary" is, I do not know, and nobody has been able to give me a definition. Still less have I got any definition of what an "auxiliary" is. But of one thing I am quite satisfied—that whatever an "auxiliary" or a "fleet auxiliary" may be, this ship was not one, and that a mere contraband transaction of this kind, supplying coal and other things to the enemy, as an incident during a voyage upon the vessel's own business, does not constitute her a vessel of that kind. I do not think I should have had any doubt about it if I were left without authority. But it seems to me I have a distinct authority in the decision of the Privy Council in *The Alwina*. (1) In that case there was no question that the ship was taking coal for the purpose of it being put on board German warships, and it was argued by the then Attorney-General that that constituted her an auxiliary, and went beyond the question of contraband. The question in the case was, could she be captured on the voyage on which she was, that being either the second or the third voyage after the one upon which she had taken the coal to the German fleet? If it was merely a question of contraband, she could not. If it was a question of her being an auxiliary in the sense of being part in any sense of the fleet, possibly she might. The Privy Council decided that she could not, and that it was a mere question of contraband. It seems to me in principle that is exactly a similar case to this.

I was referred to the correspondence between the German Ambassador in Washington and Mr. Lansing, the Under Secretary of State for the United States, with regard to some vessels which were interned in America. Of course, I should pay great attention to what those gentlemen said; but, after all, they are not legal decisions. All it comes to is this. Mr. Lansing maintained that one of the vessels, the *Locksun*,

(1) [1918] A. C. 444.

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was a tender to the *Geier*, which was a German warship. If she was, then she came, perhaps, within the meaning of an auxiliary. Mr. Lansing may have been right, or he may have been wrong, in saying she was a tender. But in my opinion the ship with which I am dealing, the *Edna*, or the *Mazatlan* as she then was, was clearly not a tender. For that reason that correspondence does not cast any light upon the matter before me. I think any case that is attempted to be made on that ground, of her being a fleet auxiliary, fails.

It was then argued that the vessel was enemy property, and that she could not become anything else during the war. If she is a merchant ship, according to the decision in *The Baltica* (1), she can be acquired by a neutral during the war so long as it is a bona fide transfer, which I have held this to be. I will assume that she was enemy property and was a German ship. I have already expressed my opinion that what took place with regard to the change of the flag from Mexican to German and from German to Mexican, had nothing whatever to do with the question of ownership. But I will assume that I am entitled to go behind the entity of the Mexican company, and to look at the persons who were really concerned ; and I will assume that this vessel was a German-owned merchant vessel at the beginning of the war. I can find nothing to show that if that is so she cannot be bona fide bought and transferred to a neutral flag, i.e., American, as this vessel was during the war. On the contrary, I find a distinct statement that she can, by the Privy Council in *The Baltica* (1), and the only argument I have heard to the contrary is that such a transfer is prohibited by art. 56 of the Declaration of London. Art. 56 is as follows: "The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed." That must be read, of course, in conjunction with the previous article, art. 55 : "The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such

(1) 11 Moo. P. C. 141.

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transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed." The difference between the two is this: Before the war, prima facie, the transaction is good; but it may be shown to be bad because it may be shown that it is made in order to evade the consequences to which an enemy vessel, as such, is exposed; after the war, prima facie—this is the highest degree to which it seems to me this article can be put—it is invalid, but it may be shown to be valid if it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. It was argued—at least, I think this was what the argument came to—on behalf of the Crown, that an enemy vessel, by reason of being an enemy vessel, is always exposed to certain consequences, and therefore she never can be transferred validly because the transfer always will evade the consequences of her being an enemy vessel. I think the Solicitor-General rather disclaimed the wish to put the argument as high as that; but if it is not to be put as high as that it seems to me to come to nothing so far as this case is concerned. If the sale is made bona fide because the purchaser wishes to get the ship for his own purposes, the transfer in my opinion is not made in order to evade the consequences to which an enemy vessel is exposed. It does no doubt put an end to the consequence that follows on her being an enemy vessel, namely, that so long as she is an enemy vessel she may be seized. But it is not made in order to evade those consequences. I think that art. 56 is really aimed at what may be called colourable transfers, and some support of that is afforded by the words that follow: "Provided that there is an absolute presumption that a transfer is void. . . . . (2.) If a right to repurchase or recover the vessel is reserved to the vendor"—giving one instance of it being colourable. I do not think that this article was intended to interfere with the general principle of law as laid down by *The Baltica* (1) at all, except so far as it might throw the onus of providing the bona fides of the transaction upon the purchaser. Here bona fides is shown, and I think that this

(1) 11 Moo. P. C. 141.

transaction was a perfectly valid one and there was nothing in the circumstances to prevent the Lloyd Mexicano passing a perfectly good title to the claimants. One of the claimants was called, and he was cross-examined, and certain things were put to him as being matters which it was suggested ought to have aroused his suspicion; and certain suggestions were put to him for the purpose of showing that this really was not a bona fide transaction. But they did not show anything of the kind; and, as a matter of fact, after he had been so cross-examined the Solicitor-General declined to raise the point and said that upon the evidence it must be taken as being a bona fide transaction. That being so, it seems to me quite clear that there must be an order of release.

Although it is implied in what I have said, I ought perhaps to add in so many words that the coaling of the *Leipzig* being, in my opinion, a contraband transaction, and nothing else, the seizure took place far too late—two or three voyages—to justify it on that ground.

Now I come to what, to my mind, is the only question in the case—at least, the only one I have had any doubt about from the beginning—that is, whether the Crown ever had any reasonable ground for seizing the ship at all. I have grave doubts whether they had. But on the whole, considering the curious companies that were concerned in the matter, and considering what the history of this vessel is, I am not prepared to say that there was no reasonable ground for seizing her. That being so, it seems to me to dispose of any question of damages; and I think that the claim for the deprivation of the use of the ship is really a claim for damages. I do not think the claimants can recover more than the deterioration, if any, which has occurred to the ship during the time she has been in the hands of the Crown. This is not contested by the Crown. She was requisitioned under a temporary requisition, by an Order of the Prize Court of the Falkland Islands, and she has been in use by the Crown since. If she has deteriorated in consequence of that user, or indeed for any other reason, while she has been in the hands of the Crown, that, I think, the Crown will have to make good. She does

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not come, in my opinion, within the exact words that have been read, of the Amendments to the Prize Rules of September 30, 1914, which provide that "Where the ship so requisitioned is subject to the provisions of Order XXVIII., r. 1, relating to detention, the amount for which the Crown shall be considered liable in respect of such requisition shall be the amount of the damage, if any, which the ship has suffered during such temporary delivery as aforesaid," because that relates only to enemy ships. But it seems to me, on principle, that the claimants are entitled to have the ship restored to them as she was; and if by reason of the Crown, without justification, as I have found, detaining her and using her for three or four years, she has deteriorated, it seems to me they must make that good. I cannot give the claimants any more than that without holding, as I have said I cannot hold, that the Crown had no reasonable grounds for seizing the ship. In the same way, I cannot give the claimants their costs without coming to that conclusion.

There will be an order of release, the Crown making good any deterioration of the vessel during the time she has been in their hands, and no order as to costs.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *W. A. Crump & Sons.*

E. C T.

ADMIRALTY. 1919

(In Prize.) *April* 3.

THE OSCAR II.

[1918, No. 1872.]

Prize Court—Negligence in effecting Capture—Action against Procurator-General—Damages—Limitation of Liability—Prize Court Rules, 1914—*Order II., r.* 3—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

The plaintiffs' goods on board the steamship *O.* were lost through a collision with His Majesty's ship *P.*, while the *P.* was effecting the capture of the *O.* The collision was solely caused by the negligence of the *P.* Proceedings in prize were instituted by the Procurator-General on behalf of the Crown against some of the parcels of goods laden on the *O.* and they were condemned, but no proceedings were instituted against the *O.* herself or against the plaintiffs' goods, which the Procurator-General admitted had a neutral destination and were not liable to condemnation. In an action brought by the plaintiffs against "H.M. Procurator-General or other the proper officer of the Crown" for damages in respect of the loss of their goods:—

Held, that as, under the Prize Court Rules, 1914, the Procurator-General was substituted for the actual captor, who, under the old practice, would have been liable in damages if he captured negligently, the Procurator-General was liable; and, further, that he could not limit his liability as could a private shipowner under s. 503 of the Merchant Shipping Act, 1894 (1), and that the plaintiffs were entitled to the restitution of their goods or their value.

Action against the Procurator-General for damages and costs.

The plaintiffs were Olivarius and Christensen and The Thames and Mersey Marine Insurance Co., Ld.; the defendant was "His Majesty's Procurator-General or other the proper officer of the Crown." The claim indorsed on the writ was in respect of the loss or destruction of 250 bags of coffee laden on

(1) By s. 503 "the owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity . . . . (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; be liable to damages beyond the following amounts . . . . (ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage."

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board the *Oscar II.* by reason of a collision between the *Oscar II.* and H.M.S. *Patuca* "while engaged in the capture, seizure, diversion, or detention of the *Oscar II.* and her cargo as prize." The bags in question were consigned on the *Oscar II.* to Olivarius and Christensen at Copenhagen, and were insured by the Thames and Mersey Marine Insurance Co., Ld.

On June 30, 1915, the *Oscar II.* was met off the island of Lewis by H.M.S. *Patuca* and ordered to stop, and the *Patuca*, in effecting the capture, collided with the *Oscar II.*, doing her so much damage that she sank together with her cargo. The Procurator-General instituted proceedings in prize against some of the goods laden on board the *Oscar II.*, but no proceedings were taken in respect of the vessel herself or in respect of the 250 bags in question.

The action was brought upon admissions of fact: namely, that the goods belonged to the claimants; that no enemy of Great Britain had any right in them; that they were being carried on a neutral ship from one neutral port to another; that the goods were not liable to condemnation as contraband of war or otherwise; that the *Oscar II.* was sunk together with the goods by reason of a collision with H.M.S. *Patuca*, and that the collision was solely caused by the negligent navigation of the *Patuca*; that at the time of the collision "H.M.S. *Patuca* was engaged in effecting the capture of the *Oscar II.* in order to bring her into port with her cargo as prize of war on behalf of His Majesty"; and that at the time in question the *Patuca* was being navigated under the command of one of His Majesty's naval officers.

The Admiralty offered to pay up to 8*l.* per ton on the registered tonnage of the *Patuca*, as in the case of a private shipowner under s. 503 of the Merchant Shipping Act, 1894, a sum of approximately 50,000*l.* As there were a number of other claimants among which this sum would have had to be divided, the claimants refused to accept the offer and instituted the present action against the defendant.

April 3, 1919. *Sir Erle Richards K.C.* and *Balloch* for the plaintiffs. Under the old practice the captor was responsible

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for the act of his agent who captured negligently: *The Der Mohr* (1); see also *The William.* (2) The Crown now stand in the position of the captors and are liable in damages: *The Zamora.* (3) No question of limitation of liability can possibly arise. The limitation sections in the Merchant Shipping Act do not apply to the Crown (s. 741), and the only reason that, in cases of collision between His Majesty's ships and merchant ships in which the former are held to blame, the Admiralty limit their liability, is that only the officer responsible for the negligent navigation is really liable, and as an act of grace the Crown agrees to be liable up to the limit that the owners of a merchant vessel of the same tonnage would be. In the present case under Order II., r. 3, of the Prize Court Rules, 1914, the Procurator-General is substituted for the captor, and the captor would have been liable in full. The Crown, through its officer the Procurator-General, has taken the benefit of the seizure and is liable in full. In none of the prize cases in which claims for costs and damages have been made, although in fact the claim may have failed, has it been suggested that where negligence was proved the claim would not lie. See *The Stigstad* (4); *The Sigurd.* (5) In fact, however, the plaintiffs are not claiming damages but merely the restitution of their goods or the value of them.

Sir Ernest Pollock S.-G. and *Stuart Bevan* (with them *Sir Gordon Hewart A.-G.*) for the defendant. There is no case in which the Procurator-General personally has been held liable in damages. *The Zamora* (3) is not an authority for the proposition contended for on behalf of the plaintiffs. In that case the goods, the subject-matter of the proceedings, had been seized as prize. In the present case no proceedings were instituted by the Procurator-General in respect of the plaintiffs' goods. All that *The Zamora* (3) decided was that when the proper officer of the Crown is before the Court, so far as the Crown is liable, damages may be awarded; it does not decide that claimants to goods never seized as prize can bring the Procurator-General before the Court and obtain damages

(1) (1800) 3 C. Rob. 129.
(2) (1806) 6 C. Rob. 316.
(3) [1916] 2 A. C. 77.
(4) [1919] A. C. 279.
(5) [1917] P. 250.

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from him. If the Prize Court Rules have the effect contended for they would be ultra vires as contrary to s. 55, sub-s. 4, of the Naval Prize Act, 1864—"Nothing in this Act shall take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of Her Majesty . . . ." Unless it be under the Prize Court Rules there is no power to bring in the Procurator-General, for the rule is clearly established by numerous authorities that one officer of the Crown cannot be sued in respect of an act committed by another officer of the Crown: see, e.g., *The Mentor*. (1) Order II., r. 3, of the Prize Court Rules provides that the Crown, i.e., the Procurator-General, may be treated as the captor, or that the actual captor may take proceedings with the consent of the Crown. If the Procurator-General had elected to take proceedings against the plaintiffs' goods it may be that he would have done so at the risk of being liable in damages. But so far as these plaintiffs are concerned the Procurator-General never put himself forward as a captor and never took the benefit of the seizure of their goods.

As regards limitation of liability, although the actual captor might be liable in full, the Crown only pays as an act of grace and is not liable in damages at all. If there is a liability it is a personal liability on the part of the Procurator-General only, and if the Crown chooses to meet that liability it can do so on terms.

THE PRESIDENT (LORD STERNDALE), after stating the issues and reading the admissions of fact, continued as follows:

It is thus admitted that what the *Patuca* was doing was in the process of effecting the capture of the *Oscar II.* to bring her cargo into port as prize of war. When the *Oscar II.* was brought into port the Procurator-General made a claim against a considerable number of parcels of goods on board her and obtained a decree of condemnation in respect of some of them. Other cases, I think, are still pending. He made no claim against the goods the property of the claimants. There has

(1) (1799) 1 C. Rob. 179.

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been more than one hearing for a request for condemnation against goods on board the *Oscar II.*, and in one of them at any rate—if not in all—a claim was put in, but not proceeded with, on behalf of the claimants in this case, for the value of these goods which they now claim in the present proceedings.

The Procurator-General, representing the Crown, denies the liability of the Crown altogether, and the question is whether there is a liability in respect of the goods imposed upon him, or whether there is not. I think that it is necessary first to see what would have been the position of an individual captor in the old days. Under the old practice, as I understand it, the captor brought his capture into the Prize Court, and if he got condemnation he put the value of it into his pocket. On the other hand, if in effecting that capture he had damaged property belonging to another person against whom he did not ask for any sentence of condemnation, and against whose goods he made no claim, he was liable to that person because he had done the damage in effecting the seizure of which he was taking the benefit. That seems to me to be clear from the decision in *The Der Mohr* (1), because, although it only appears inferentially, I think it does appear that the ship and cargo had been seized and that the ship was being brought into port for the purpose of proceedings being taken against the cargo, there being no intention to seize the ship. But the ship was lost by the negligence of the captor, and the owner was held entitled to maintain a claim for restitution of his ship, although no claim had been made by the captor to condemn it at all, and although it was only being brought in as part of the necessary operation of bringing the cargo in. That was the position of the captor before the substitution of the Crown for the individual captor by the Naval Prize Act of 1864 and under the Prize Court Rules. To my mind the whole question in the case is this. When the Crown chooses to come in and take advantage of a seizure, does it by so doing assume the position in toto of the original captor, or does it only assume the position of captor with respect to the goods against which it actually makes a claim? It is not very

(1) 3 C. Rob. 129.

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strenuously contested that if the Crown, represented by the Procurator-General, makes a claim against certain parcels of goods, what may be called a counterclaim by the owners or persons interested in those goods may be maintained against it, but what is denied is that by taking proceedings against certain parts of a cargo the Crown adopts the position, or is put into the position, of the individual captor who is liable under these circumstances to have a claim made against him by a person who is not entitled to the goods which the Crown were asking the Court to condemn.

It is a very important question, and I do not say that it is an easy question, and if it came before me under circumstances where I thought I had to decide it for the first time I should probably have taken some time to consider it. But in my opinion it is not open to me when I look at *The Zamora*. (1) I quite agree that the decision in *The Zamora* (1) is not founded upon the same circumstances as these. What was said in *The Zamora* (1)—the words I am going to refer to in a moment —may perhaps be said to be dicta, but it seems to me that there are two kinds of dicta, one is a dictum which is uttered, if I may say so, casually without the words being really under the consideration of the person who is delivering his judgment, another is a dictum which is the considered judgment, and part of the process of reasoning of the person who is delivering his judgment, and if I find a dictum of that second kind by the Privy Council, in my opinion it is my duty to follow it, and I consider that I do find it in *The Zamora*. (1) Lord Parker, who delivered the judgment, in examining the Prize Court Rules, and dealing with the arguments which were founded upon them, and the arguments in the case generally, gave judgment in the way that I shall read in a moment, but before that I think it will be of service to look at the argument with which their Lordships were dealing. The question in the particular case as to whether there was a right to requisition or not was argued first, and then after that, the report says "Their Lordships subsequently desired to hear arguments upon the question of the right to award damages and costs." The Attorney-

(1) [1916] 2 A. C. 77, 109, 111.

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General dealt with the question of costs, and then on the question of damages said: "Now that captors are no longer directly interested in the prize money, under the present Prize Court Rules the Crown has been substituted for the captors as a party to the suit." Then Lord Parker said: "Unless the Crown has succeeded to the position of the captors, and compensation can be awarded against the Crown either in damages or in costs, a neutral claimant is deprived of a valuable right." The Attorney-General's answer was that "The claimant can issue a writ against the captors for damages. Damages are only awarded against the actual wrong-doer," and he cited the case to which I was referred, *The Mentor*. (1) "And although in practice the Crown would not allow one of its officers to pay the compensation, the Crown itself cannot be liable." The report continues: "Damages or costs, therefore, could be awarded against the captors, which in fact would be paid by the Crown, but the Prize Court Rules do not throw upon the Crown or the Procurator-General a liability which did not exist before, and no order can be made against the Procurator-General for damages or costs." That was the argument in favour of the Crown. The argument on the other side was: "The Prize Court Rules should not be construed so as to alter the rights of neutrals. Neutral claimants should have a remedy in the prize proceedings and not be left to independent action against the captors. The true position is that the Crown has condescended to take over the liability of the captors through its officer, the Procurator-General." I may point out that Lord Parker, in the passage which I have read, draws attention to the fact that if the Crown comes in and takes the benefit that the captor would otherwise have had, but does not accept the liability, or has not imposed upon it the liability that the captor would have had, the claimant is in a worse position, and it does not seem to me for this purpose to matter whether it is the claimant to the part of the goods proceeded against, or the claimant in respect of other goods which have been damaged by the Crown in making the seizure—he is certainly deprived of a valuable right. It is said he may

(1) 1 C. Rob. 179.

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proceed against the captor. It seems to me that there may also be an injustice done to the captor by that. In old days the captor who claimed benefit by a seizure was held liable to the owner of goods, which he did not claim to seize, for damage that had been done to them in the course of the seizure by reason of the captor's negligence. Upon the argument which has now been addressed to me on behalf of the Crown, the Crown, represented by the Procurator-General, takes the advantage that the captor got out of the seizure of the whole, but leaves to the captor the liability for the negligence by which he got it, and therefore both the claimant and the captor would seem to be left in a very much worse position.

I do not think, however, that it is open to me to pronounce any independent opinion upon the matter at all, because in dealing with the argument which I have read, the Privy Council in considering the effect of the Prize Court Rules came to the conclusion, in my opinion, that the Crown stood in the position of the captor for all purposes—not for the purposes of the goods which were claimed in the particular proceeding, but for all purposes, and as it took advantage of the capture, so it took the disadvantage and the liability of the captor. The part of the judgment which is necessary for the present purpose begins on p. 109. "It was, however, suggested that the procedure prescribed by the existing Prize Court Rules precludes the possibility of the Court awarding damages or costs in the existing proceedings. Under the old practice the captors were parties to every proceeding for condemnation, and damages and costs could in a proper case have been awarded as against them. But every action for condemnation is now instituted by the Procurator-General on behalf of the Crown, and the captors are not necessarily parties. It is said that neither damages nor costs can be awarded against the Crown. It is not suggested that the persons entitled to such damages or costs are deprived of all remedy, but it is urged that in order to recover either damages or costs, if damages or costs are claimed, they must themselves institute fresh proceedings as plaintiffs, not against the Crown but against the actual captors. This result would, in their Lordships' opinion, be extremely

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inconvenient, and would entail considerable hardship on claimants." It is right to say that the case before their Lordships at that time was a case in which damages were being claimed in respect of the goods against which the Crown were taking proceedings. I do not propose to read the next two or three pages which deal with the rules, but I find that in dealing with them the noble and learned Lord said this—and I shall go back to another passage which I have passed over—"In their Lordships' opinion, these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject" (p. 111). To my mind the proceedings there are not limited to the proceedings against the particular goods. They are proceedings to obtain the benefit of the seizure in the course of which the damage has been done. That is what the Crown is asking for—that by the seizure of the goods on board the *Oscar II.* it is entitled to so much as prize. But when it does that, the Privy Council says that the Crown takes upon itself the liability to damages and costs to which under the old procedure the actual captors were subject, and that is not limited to a claim to the goods in respect of which the Crown is asking condemnation, as admittedly in the old days it was not limited to that. It seems to me that that would be really sufficient to bind me in this case, but I find a much more direct statement in a passage on p. 109 which is to this effect: "It is provided by Order II., r. 3, that every cause instituted for the condemnation of a ship or (by virtue of Order I., r. 2) goods shall be instituted in the name of the Crown, though the proceedings therein may, with the consent of the Crown, be conducted by the actual captors. By Order II., r. 7, in a case instituted against the 'captor' for restitution or damages the writ is to be in the form No. 4 of Appendix A. This would appear to contemplate that an action for damages can be instituted against the proper officer of the Crown, any argument to the contrary, based upon the form of writ as originally framed, being rendered invalid by the alterations in such form introduced by Rule No. 5 of the Prize Court

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Rules under the Order in Council dated March 11, 1915." I think that should be under the Order in Council of March 23, which was passed in consequence of the Order of March 11. "It is not, however, necessary to decide this point." It was, therefore, not a decision on the point, but an expression of opinion on the part of the Privy Council as part of a train of reasoning which led up to the decision which they gave, and I do not think that I am at liberty to disregard such an expression of opinion. I think that what is to be gathered from this judgment is that in their Lordships' opinion when the Crown, by the Procurator-General, takes the benefit of a seizure which has been made, and institutes proceedings against goods, or a ship, in respect of that seizure, instead of the proceedings which used to be taken by the actual captor, it puts itself in the position of that actual captor for all purposes. That, in my opinion, is the principle on which this judgment is based, and is not for all purposes limited to the particular goods in respect of which the Crown makes the claim.

Therefore, important and rather difficult as the case is, I do not think that it is open for me to consider it. I think I ought to follow what, in my opinion, is the meaning of the decision in *The Zamora*. (1) I ought, therefore, to hold that the Crown, if it chooses to take advantage of a seizure, is subject to the same liability as the captor would have been if he had done the same. If that be so, it is admitted that the captor in these circumstances would have been liable for injury caused by his negligence to goods which were not the subject of his claim, and I think the Crown is subject to the same liability according to this decision. I am not quite sure whether the proceedings taken here were the right ones. I do not express any opinion about it. It seems to me that as there was a proceeding against goods on the *Oscar II.* this judgment would seem to point out that the ordinary procedure would have been to make a claim in those proceedings, but I think it is a mere matter of procedure, and if there be a liability it would only be a matter of transferring the proceedings. It would merely resolve itself into a question of costs and it

(1) [1916] 2 A. C. 77.

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would not be a matter worth spending any time upon. What the parties want decided is the question whether the Crown is liable under this claim or not. According to the judgment in *The Zamora* (1) I think it is. I should have taken time to consider the point if I had not thought that it was governed by that case. I think also it is a question which ought to be decided by the Privy Council, and the sooner it gets there the better. Therefore I have thought it better not to reserve my judgment.

There remains only one other point, and that is whether there is a limitation of liability. It does not seem to me that the question of limitation arises under these circumstances at all. The order used to be, and I think the order should be still, that property which has been destroyed or lost by the wrongful act of the captor is to be restored, and the claimant is entitled to a decree or judgment for the restoration of the goods. Of course they cannot be restored in specie, because they are at the bottom of the sea, but they must be restored, if not in specie, by what will represent their value, and their value must be ascertained by the Registrar.

There will be judgment for the claimants, that they are entitled to the restitution of these goods as against the Procurator-General, and the decree will be in their favour with costs.

Solicitors for the plaintiffs: *Waltons & Co.*
Solicitor for the defendant: *The Treasury Solicitor.*

(1) [1916] 2 A. C. 77.

E. C. T.

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April 4.

(In Prize.)

THE KRONPRINS GUSTAF.

[1915, No. 647.]

Prize Court—Conditional Contraband—Neutral Port—Enemy Destination—Consignment to Consignors' Agent for Sale—Declaration of London—Order in Council, No. 2, October 29, 1914, cl. 1 (iii.).

By an Order in Council of October 29, 1914, art. 35 of the Declaration of London, 1909, which abrogated the doctrine of continuous voyage in the case of conditional contraband, was adopted subject to modifications. Clause 1 (iii.) provided that notwithstanding the provisions of art. 35 conditional contraband should be liable to capture on board a vessel bound for a neutral port "if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods," such a person being construed in *The Louisiana* [1918] A. C. 461, as some person other than the consignor to whom the consignor has parted with the real control of the goods.

Conditional contraband, namely, coffee, was consigned by a Santos firm to a named consignee at Gothenburg who was the consignor's agent for sale. The coffee was claimed by another Swedish firm who had bought it from the consignors through the agency of the consignee in order to resell it to a firm in Hamburg:—

Held, that, under ordinary circumstances, an agent for sale being a person who has to act according to his principal's instructions, he is not such a consignee as would satisfy the requirements of the Order in Council, and that the coffee was subject to condemnation.

Action for condemnation of conditional contraband as prize.

Under bills of lading dated April 9, 1915, 500 bags of coffee (conditional contraband) were shipped by Nossack & Co., of Santos, on board the Swedish steamship *Kronprins Gustaf*, consigned to Gothenburg to one Gustaf Thomee, of Malmo. The coffee was claimed by G. O. E. Nordblom & Co., wholesale provision merchants, of Varberg, Sweden. The ship sailed on April 17, and the goods were seized as prize on May 20.

According to the claimants' affidavit they had bought the goods through the agency of Thomee from Nossack & Co. in January, 1915, and had agreed to sell them on March 4, 1915, to a firm, Otto Hesse, in Hamburg. The claimants

alleged, however, that when they heard that the coffee had been seized, and that they would have to give a guarantee for neutral consumption, they cancelled the sale. The case for the Crown was that if the goods had not been intercepted they would have been ultimately delivered in Hamburg, and that the claimants were not protected by the Order in Council of October 29, 1914, which, subject to modifications, adopted art. 35 of the Declaration of London abrogating the doctrine of continuous voyage in the case of conditional contraband. By modification (iii.) of cl. 1 of the Order, "notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy."

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Stuart Bevan* for the Procurator-General.

Sir Erle Richards K.C. and *Sir Robert Aske* for the claimants.

[It was argued for the claimants that assuming, which was not admitted, that the goods had an enemy destination, inasmuch as the claimants had bought them before seizure, and they were shipped to a named consignee, the claimants were entitled to the protection of the Order in Council of October 29, 1914, and *The Louisiana* (1) and *The Kronprinzessin Victoria* (2) were referred to.

The Crown's contention, on the other hand, was that the named consignee, Thomee, being merely the agent for sale of the consignors, was not such a consignee as would satisfy the requirements of the Order in Council. He was not a person other than the consignor to whom the consignor had parted with the real control of the goods (*The Louisiana* (1)); and, as the evidence established that the goods were destined for Hamburg, a base of supply, they were subject to condemnation.]

(1) [1918] A. C. 461. (2) [1919] A. C. 261.

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THE PRESIDENT (LORD STERNDALE): In this case the Crown asks for the condemnation of 500 bags of coffee shipped by Nossack & Co., Santos, and consigned to Gustaf Thomee, of Malmo. The bill of lading was to Gothenburg, and the coffee is claimed by G. O. E. Nordblom & Co., as purchasers from Nossack & Co. The shippers, Nossack & Co., are described in the affidavit filed on behalf of the Crown, and I do not think it is necessary to say more about them at the moment than that they obviously have very strong German sympathies; and, in fact, the company is composed of German shareholders. Whether it is a German firm in the sense of making these goods enemy property it is not necessary to consider. It also appears perfectly clearly from the documents, to which I have been referred, that Nossack & Co. were engaged in business with Germany—some time, it is true, after this transaction. [His Lordship read two intercepted letters from Eugen Nossack in Hamburg to Fritz Nossack in Santos, and continued as follows:] It is not necessary to read any more to show that this firm were, naturally from their point of view, trading with Germany and sending as much coffee as they could into Germany.

The information that is given about the consignee in the Crown's affidavit is that he is a member of a firm of commission agents carrying on business at Malmo, and that "since the war the profits of the firm have been chiefly connected with coffee, and it has also received large quantities of tea and dried fruits which were intended for Germany. The firm was willing to lend its services for any business proposed by the enemies of Great Britain, and it has acted as intermediaries and dummy consignees for several enemy firms, including Eugen Urban and Otto Hesse, coffee merchants, Hamburg. During 1913 and 1914 no coffee was imported by the firm; but between March, 1915, and December, 1915, at least 1024 tons of coffee were shipped to it in its own name." I disregard the general statement that it was willing to lend its services for any business, and confine myself to the fact that is stated, that it has acted as an intermediary and dummy consignee. I have had occasion to find that Thomee acted

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as dummy consignee, or nominal consignee, in the group of coffee cases known as "the Urban group"; and I think the late President found the same in other cases. At any rate, I have no doubt that Thomee constantly did act in that way. He was the consignee of this parcel.

The history of the parcel, so far as I follow it, is this. On January 26, 1915, Thomee made a contract in which the sellers were Nossack & Co., of Santos, and the buyers were the claimants at Varberg. The price was 52 marks per 50 kilos., and payment was by sight draft on the Svenska Kredit Aktiebolaget at Malmo, against documents. Marine and war insurance were to be covered by the buyer. On the same day Thomee wrote to the claimants, asking them to send a credit to the Svenska Kredit Co., which was his bank, in Malmo, certifying that they would honour the documents for 500 bags per *Kronprins Gustaf*, purchased from Nossack & Co., through Gustaf Thomee, at a price of 52 marks per 50 kilos. c.f. Varberg. The claimants gave a guarantee to the Svenska Kredit Bank as they were asked, and the bank then sent a cable to Brazil: "We pay draft covering March shipment steamer *Kronprins Gustaf* thousand bags coffee 104 cost freight Sweden account Gustaf Thomee." Apparently that took some time to get through, because on the next day the shippers cabled saying they had not been informed as to the credit; but they were eventually informed of it, and the credit was opened on January 27, 1915. The claimants having written to the Svenska Bank giving the guarantee, wrote to Thomee also saying they had given it on January 26 or 28.

On March 4 there was a contract between the claimants and Otto Hesse, of Hamburg, for 500 bags Santos coffee, shippers Nossack & Co., price 65 pfennig per half-kilo. f.o.b. Gothenburg, Brazil weight. That leaves a profit of 13 marks per 50 kilos. to Nordblom & Co., the claimants. That contract did not go through, and it did not go through for the reason that the consignment was seized by the British patrols. But taking the claimants' case as being a genuine one, that this was a sale to them from Nossack & Co., through Thomee,

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and by them to Otto Hesse, Hamburg, there is no doubt that, but for the interference of the British cruisers, the contract would have been carried out and the goods would have gone to Otto Hesse.

The question is whether they had an enemy destination, and, owing to that enemy destination, whether they are liable to condemnation as prize.

It was argued on behalf of the Crown that both Thomee and the claimants were mere nominees of some one, either the shipper or Hesse. I think that Thomee was a dummy consignee. I do not use the word "dummy" in an offensive way. I do not think that he was there as consignee in any way of deception; he was a consignee as agent for the shipper. It may be that an agent, under certain circumstances, may be a consignee within the meaning of the Order in Council of October 29, 1914, sufficient to satisfy the definitions of a consignee in *The Louisiana* (1) and *The Kronprinzessin Victoria*. (2) It may be that although he is only an agent for sale, he has such entire control that he may be a consignee within those cases. I do not express any opinion, except that it is possible. But in ordinary circumstances an agent for sale is a person who has to act according to his principal's instructions, and I see nothing in this case to show that Thomee had any more independent control than any other agent who has to do what his principal tells him. Therefore he does not seem to me to satisfy the definition of a consignee as defined in those cases—some person other than the consignor who has a free and absolute control over the goods. I think Thomee was representing Nossack & Co., and only representing Nossack & Co. It is not suggested that he ever bought from Nossack & Co. and resold to the claimants. Indeed, the contract that was made through Thomee was made for Nossack & Co., and Nossack & Co. were the sellers to the claimants. Therefore the first point which I decide is that Thomee was not a consignee who would satisfy the requirements of the Order in Council of October 29, 1914, as interpreted by the cases referred to.

(1) [1918] A. C. 461. (2) [1919] A. C. 261.

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That being so, if the goods had an enemy destination, then, subject to the question of the Order in Council of October 29, 1914, they are liable to condemnation. I do not see how it can be doubted that these goods had an enemy destination. The claimants have put the matter before me, as far as I can see, with perfect frankness, and they say: "We did sell to Otto Hesse, but we sold to him on March 4." Whether they communicated that to the shippers or not I do not know. But at the time the goods sailed from the port of Santos, in Brazil, they were proceeding under a contract by the shipper to the claimants, and under a contract by the claimants to Otto Hesse & Co., to be delivered to Otto Hesse & Co. in Hamburg. I cannot doubt that there was an enemy destination, and therefore, subject to the question of art. 43 of the Declaration of London adopted by the Order in Council, I think the goods are liable to condemnation, because—it is not necessary to go at length into it again—Hamburg, to which they were destined, is a base of supply for the armed forces of the German Crown.

But it is said that the transaction is protected under art. 43 of the Declaration of London. Art. 43 protects persons who ship contraband, which is not contraband at the time of shipment. The facts are as follows: A list of contraband articles was published in August, 1914, which undoubtedly included coffee, but in November, 1914, notification was sent to neutral countries that the British Government would treat as contraband only certain articles which did not include coffee. Notice of that was given to Sweden; no notice of it was given to Brazil. The *Kronprins Gustaf* sailed from a Brazilian port. The last part of art. 43 says that "a vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband . . . . provided that such notification was made in sufficient time." Notification of the list of contraband articles, which included "foodstuffs," and, therefore, included coffee, was sent to the Government of Brazil some time in August, 1914. This ship sailed on April 17, 1915; and therefore, so far as Brazil is concerned, there is no doubt the ship, sailing from a Brazilian port, must be

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deemed to be aware of the notification of contraband of August, 1914. But it is said that although that might be true, if the ship belonged to a Brazilian owner, she did not; she belonged to a Swedish owner, and notification was given to Sweden in November, 1914, that coffee would not be treated as contraband; therefore, every Swedish owner, wherever his ship might be, was entitled to go on shipping coffee until notice had been given to Sweden at such a time as would enable him to notify all his ships all over the world, wherever they might be, of the withdrawal of the contraband list published in August, 1914. I do not think that is a sound contention, although I do not think it is really necessary to decide it. In my opinion this ship, sailing from a Brazilian port, comes under the second clause, "and must be deemed to be aware of the goods being contraband." But it seems to me to be perfectly obvious that a person in Sweden, who receives notice at or about March 26 or 23, 1915, of the revocation of the notification sent to various neutral countries in November, 1914, had ample time to inform the vessel in which the goods were to be shipped, lying in Santos, long before the vessel left there, that coffee was now to be regarded as contraband; and, therefore, even supposing that the contention on behalf of the claimants were sound, which I do not accept, I think in this case there was ample time to give information to the vessel. The claimants want me to say that anybody who has made a contract before the withdrawal of the Order is entitled to carry out that contract, although the British Government has given notice that it is going to insist upon its rights as to contraband. I can find no foundation for such an argument in the provisions of the Declaration of London, or anywhere else. I think that the contention that they are protected by art. 43 fails; first, because I think the ship, sailing from a Brazilian port, must be deemed to be aware of these goods being contraband; and secondly, even if the fact of her being Swedish-owned has any effect at all, there was notice to Sweden in ample time for the Swedish owner to inform the ship of the withdrawal of the concession made by the Order of November, 1914.

Therefore I think all the grounds of claim fail. The claim must be dismissed, and the goods condemned as prize, with costs.

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Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *Botterell & Roche.*

E. C. T.

ADMIRALTY.

1918

Dec. 4, 5.

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May 13.

THE SVANFOS; THE BORGILA.

[1917, fos. 639 and 643.]

Admiralty—Civil Salvage—Prize Salvage—Recapture—Rescue of Neutral Vessels from German Submarine—Claims by King's Ships—Quantum of Salvage—Naval Prize Act, 1864 (27 *&* 28 *Vict. c.* 25), *s.* 40.

A German submarine had stopped two neutral vessels, and was about to destroy them as prize of war, when a British submarine came up, engaged the enemy submarine and drove her away:—

Held, that the general rule that no salvage is given on the recapture of a neutral vessel has no application when the belligerent State of which the captor is a national has made it apparent that in defiance of international law the destruction of the neutral vessel will be justified by the Courts of the captor; that the rescue was a salvage service; and that, although rendered by a King's ship, the commander, officers and crew were entitled to salvage remuneration.

Observations on the amount of salvage payable under s. 40 of the Naval Prize Act, 1864, in respect of recaptures, and on the question whether, in the changed circumstances of modern warfare, rescue or recapture by King's ships of merchant vessels trading to countries of the King or his allies should give a right to salvage.

Quaere, whether a claim for salvage on recapture can be made under the civil jurisdiction of the Probate, Divorce and Admiralty Division, or whether it is only cognisable under the Court's prize jurisdiction.

ACTIONS OF SALVAGE.

The plaintiffs were the commander, officers and crew of H.M. Submarine *G* 7. The defendants were the owners of the steamship *Svanfos*, her cargo and freight, and the owners of the steamship *Borgila*. Both were Norwegian vessels.

The services consisted in rescuing the vessels from a German

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submarine which was about to destroy them. The facts are fully stated in the judgment.

Bateson K.C. and *Noad* for the plaintiffs. Salvage is recoverable for assisting vessels in peril, and it is immaterial whether the peril arises from maritime dangers or is due to pirates or insurgents. See *The Cargo ex Ulysses* (1); *The Trelawney*. (2) In *The Carrie* (3) war as well as marine risk was taken into account, and it merely enhances the service if the risk is so imminent that it is only by fighting the enemy that it is averted. Although it was the duty of the crew of the British submarine to fight the enemy they owed no duty to the owners of neutral vessels to protect them from piracy, and still less to remain by them at considerable risk after the German submarine had dived. Actual recapture is not necessary: *The Edward and Mary*. (4) The cases should be determined according to the principles of general maritime law, but if the Court should be of opinion that the claims should have been brought in prize, the necessary amendment should be made and the cases treated as if brought under the prize jurisdiction of the Admiralty Division. See *The Pontoporos*. (5) Had these vessels been British vessels, under s. 40 of the Naval Prize Act, 1864, the plaintiffs would have been entitled to one-eighth of their value on recapture. The vessels were saved from certain total loss, and the plaintiffs should be handsomely rewarded. [Reference was also made to *The Apollo* (6) and *The Pensamento Feliz*. (7)

Stephens K.C. and *Dumas* for the defendants. No prize salvage is recoverable on the civil side of the Court's jurisdiction, and in the case of the *Svanfos* there was no maritime danger at all, the services at most consisted in rescue from a possible war risk. But as the cargoes were not contraband, and it is not proved that the vessels were in the German prohibited zone, the inference is that the vessels would not have been sunk. In the case of the *Borgila*, which was low in the

(1) (1888) 13 P. D. 205.
(2) (1802) 4 C. Rob. 223.
(3) [1917] P. 224.
(4) (1801) 3 C. Rob. 305.
(5) [1916] P. 100.
(6) (1801) 3 C. Rob. 308.
(7) (1809) Edw. 115.

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water and leaking, the plaintiffs rendered services in the way of pumping, etc., which admittedly entitle them to civil salvage. As regards the rescue from the German submarine it is submitted that the plaintiffs are entitled to nothing. Where ships, British, allied, or neutral, are rescued by British warships from war perils alone no claims for salvage should be allowed under the conditions pertaining in the present war. British warships owe a duty to protect all vessels making towards British or allied ports with their cargoes (see *The F. D. Lambert* (1)), and in fighting the German submarine the plaintiffs were only doing their duty, and therefore were not volunteers: see *The Francis and Eliza* (2), where a King's ship was refused salvage for rescuing a convict ship from the possession of the convicts who had overpowered the crew. Where danger from both war and marine perils exists both have been taken into account (*The Carrie* (3)), but there is no authority for the proposition that rescue from a war peril alone entitles the rescuers to salvage.

Noad in reply. There is no strict dividing line between civil salvage and prize salvage. There may be a succession of events giving rise to both war and marine risks.

The Court will adapt itself to the altered conditions and have regard to risks which were unknown a century ago when war at sea was carried on fairly and neutral vessels were not foully sunk. [*The War Onskan* (4) was referred to.]

Cur. adv. vult.

1919. May 13. HILL J. read the following judgment:— In these cases a claim for salvage is made by the commander, officers and crew of H.M.S. submarine *G* 7 for services rendered to the steamship *Svanfos* on April 15, 1917, and to the steamship *Borgila* on April 15 and 16, 1917, in the North Sea. The *G* 7 was in command of Commander Geoffrey Walker, and her officers and crew numbered 30.

The *Svanfos* was a Norwegian steamship of 896 tons gross, and was on a voyage from a Norwegian port to Larne with

(1) [1917] P. 232, n.
(2) (1816) 2 Dods. 115.
(3) [1917] P. 224.
(4) (1799) 2 C. Rob. 299.

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a cargo of wood pulp. The *Borgila* was a Norwegian steamship of 1434 tons gross, and was on a voyage from a Norwegian port to Lerwick en route to Rouen, with a general cargo, mainly wood pulp and paper.

The claim as regards the *Svanfos* is for salvage of ship, cargo and freight. After the salvors' services the *Svanfos* reached a Norwegian port, but ship and cargo were subsequently arrested in this country, and appearance entered for both. The values are as follows :—Ship, 50,000*l.*; cargo, 44,072*l.*; and no freight at risk—a total value of 94,072*l.*

The claim as regards the *Borgila* is for salvage of ship only. After the service, the *Borgila* reached a Norwegian port, but the cargo was dispersed, and not arrested, and the cargo owners have not been served with the writ; the ship was subsequently arrested and appearance entered for the owners. The value of the *Borgila* was 78,000*l.*

The plaintiffs having applied for the consent of the Lords Commissioners of the Admiralty to their instituting proceedings, the Lords Commissioners replied that they were "pleased to approve of a claim for prize or civil salvage being made in each case as the officers and men concerned may be advised."

The services in respect of which the claims are made fall into two parts, first, a rescue from a German submarine, which is common to both ships, and, secondly, subsequent services to the *Borgila*, which was disabled and without any of her own crew on board. These subsequent services to the *Borgila* raise no question of difficulty, and it is not disputed that in respect to them the plaintiffs are entitled to a salvage award; the services were of a kind which the Court has frequently had to consider during the last three years. The service of rescue, on the other hand, raises a question of great importance, which is, for the first time during the war, brought before the Court as a clear and distinct question of principle. For reasons stated below, the claim in respect of the *Svanfos* depends on the answer to this question, and on that alone.

The material facts are as follow :—Somewhere about six o'clock on the evening of April 15, 1917, the *Svanfos* and the *Borgila* were on their voyages when a German submarine

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brought them to by firing several shots. The master and crew of the *Borgila* took to the boats and rowed out of the line of fire, and, according to the log, they "could see the vessel and the submarine until night came on. After darkness had set in we could see several flashes of light in the direction of the *Borgila*, from which we inferred they were sinking the vessel. We then made for land and were taken up outside Hummelsund."

The master and crew of the *Svanfos* took to the boats, and awaited the submarine. The master was ordered on board the submarine, and the chief officer was ordered to fetch the ship's papers from the *Svanfos*, which he did. An officer of the submarine, with two of his crew, were then taken in the *Svanfos's* boat to the *Borgila*, which he boarded. He took possession of the vessel's papers, and the boat then started to return to the submarine. The ships were in this position—the *Borgila* and *Svanfos* about three cables apart, the submarine on the surface between them, and the officer and two men of the submarine in one of the *Svanfos's* boats with the *Borgila's* papers, just leaving the *Borgila's* side, and the other boat of the *Svanfos* in tow of the submarine, and the master of the *Svanfos* and the *Svanfos's* papers on board the submarine—when at about 7.50 p.m. *G* 7 came to the surface at about 400 yards' distance and opened fire upon the German submarine. A running fight continued, and, to quote Commander Walker: "It turned into a chase, both firing. In a few minutes, as soon as I got close, he dived. I dived on top of him. About half an hour later I returned to the *Borgila*. The *Svanfos* was still there."

Meantime both the *Svanfos's* boats had returned to the *Svanfos*, and the chief officer and crew of the *Svanfos*, with the officer and two men from the submarine, went on board the *Svanfos*, and some time after the return of *G* 7 the *Svanfos* got up steam, exhibited her navigation lights, and went on her way, and on the following day reached a Norwegian port. So far as the *Svanfos* is concerned, this is the whole story.

In my view, the service, and the only service *G* 7 rendered to the *Svanfos*, consisted in fighting and chasing away the

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submarine. It was contended that her being in the neighbourhood while the *Svanfos* got up steam was a protection against a reappearance of the submarine, and, in itself, a salvage service. The statement of claim, however, alleges that "the *Svanfos*, seeing her aggressor driven off, at once proceeded at full speed from the locality." And though, in fact, there was some time occupied in getting up steam and during part of that time *G* 7 was in the neighbourhood, I am unable to discover in that circumstance anything which, by itself, would constitute a salvage service.

The question as regards the *Svanfos* is this: Did the commander, officers and crew of *G* 7 earn salvage by reason that they fought and drove away the submarine? One question as regards the *Borgila* is the same; the other is, what amount should be awarded for the subsequent services to the disabled *Borgila*?

The subsequent services to the *Borgila* are described in the statement of claim as follows: "Having rescued the survivors *G* 7 returned to the *Borgila* and put a salvage party on board that vessel. The *Borgila* was found abandoned, very deep in the water, and apparently slowly sinking. The engine-room and stokehold were both awash, all fires were out, and a large amount of coal was washing to and fro in the stokehold, making all work therein a matter of considerable danger. With great difficulty leaks were stopped, and by lighting fires in the upper furnace of one boiler steam sufficient to work the bilge pumps was, by degrees, obtained. The work was prolonged and arduous, as the suctions of the pumps were constantly choked by the loose coal, and on account of the repeated stoppage of the pumps through insufficient steam. Eventually, the pumps gained on the water, and it became possible to replace the floor plates in the engine-room and stokehold. Fires were lit up in all boilers, and by 2.30 p.m. a full head of steam had been raised, and the main engines, together with the auxiliary machinery and the steering gear, were working." Except the statement that the *Borgila* was apparently slowly sinking, those statements are substantially admitted in the defence. It is not clear what was the cause of the leak.

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During the afternoon a Norwegian torpedo-boat destroyer arrived, and at the request of her commander the *Borgila* was handed over to her care, and *G* 7 returned to her duties. Her salvage crew had, by their efforts, got control of the leak, and they had put the *Borgila* in a condition to proceed under her own steam to Norway. Undoubtedly that work was performed under considerable difficulty and in unfavourable circumstances, and was quite a useful service.

I will dispose first of the question common to both claims. I have stated what *G* 7 did. It now has to be considered what was the risk to which the *Svanfos* and *Borgila* were exposed. The pleadings admit the locality N. 60·06, E 3·16. On January 31, 1917, the German Government issued a notice declaring that "from February 1, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockade zones around Great Britain, France, Italy, and in the Eastern Mediterranean." The notice then stated the limits of the zones. I have considered the matter with the help of the Elder Brethren, and I find that N. 60·06, E. 3·16, is within the limits. On his examination in Norway the submarine officer professed that the ships were not within the limits, that the papers were being examined only to see whether the cargoes were contraband, that they were not contraband, and that the ships would not have been sunk. It is not necessary to consider whether the cargoes were contraband. Contraband was of little importance after the Germans declared blockade zones, and especially since the declaration of January 31, 1917. The crew of the *Svanfos* expected that their vessel would be sunk. The master and crew of the *Borgila* thought the *Borgila* had been sunk. The boat which took the German officer to the *Borgila* had no explosives on board, but explosives were seen to be brought up on to the deck of the submarine. Another Norwegian ship, the *Paris*, was sunk on the same day; the precise position was not proved, but early on the morning of April 16 one of the *Paris's* boats reached *G* 7.

It is, I think, beyond all reasonable doubt that but for the

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arrival of *G* 7 the submarine would have sunk both the *Svanfos* and the *Borgila*. Each was completely in her power, the *Borgila* abandoned, the *Svanfos* with no one on board; the submarine had the means to sink them, they were within the zone of destruction; they would have been sunk. The papers were being sought, not for the purpose of investigation whether the vessels were prize or not, but as evidence to justify their destruction when proceedings were subsequently taken in the German Prize Court.

The facts then are as follow: An enemy ship of war had stopped two neutral ships, and reduced them completely into her power, and was about to destroy, as prize of war, the neutral ships, which she was unable to take into port. A British ship of war came up and engaged and drove away the enemy ship of war, and thereby saved the neutral ships from destruction. The only distinction between the two cases is that in the *Borgila* the plaintiffs took temporary possession of the rescued ship, and in the *Svanfos* they did not. The one case—the *Borgila*—was a capture and recapture, the hand of the recaptor being subsequently taken off the ship. The other case—the *Svanfos*—was a capture and a rescue merely.

I should here mention, to show that it does not affect the decision, the general rule as to recapture of neutral ships, and the exception to that rule. They are stated by the late Sir Samuel Evans in the judgment in *The Pontoporos* (1), where he applied the exception. The general rule that no salvage is given on the recapture of an innocent neutral ship is based on the presumption that no peril is incurred by the capture, because the neutral ship will be carried into the courts of the captor, and there justice will be done according to international law, and the innocent owner will recover his ship, or its value and expenses. But the general rule has no application where the State of the captor and its Courts are notoriously outraging international law, and have made it apparent that justice will not be done, and that in defiance of international law the neutral ship will be condemned or its destruction justified by the Courts of the captor. In such a

(1) [1916] P. 100.

case, as Lord Stowell said in *The Sansom* (1): "The peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation." The exception was acted upon constantly by Lord Stowell and the Lords of Appeal, both before the Peace of Amiens and during the later French War. See *The War Onskan* (2); *The Eleonora Catharina* (3); *The Carlotta* (4); *The Acteon* (5); *The Sansom* (1); and, in America, *Talbot* v. *Seeman*. (6)

As were the French decrees of January 19, 1798, and November 21, 1806, and the practice of the French Prize Courts, so were the German declarations of blockade zones, and the practice of the German submarines, and the decisions of the German Prize Courts in reference thereto. The *Svanfos* and the *Borgila* were in such case that they would have been destroyed, and the owners would have received no remedy at the hands of the German Prize Court.

Such being the facts, the question is, do the commanders, officers and crews of the King's ships of war become entitled to salvage for the rescue of a neutral ship from the hands of the enemy, who has reduced her completely into his power and is about to deal with her as prize of war?

It is said for the plaintiffs that they rendered a highly meritorious service at great risk to themselves. It is said for the defendants that *G* 7 was a ship of war, and that the plaintiffs only did that which it was their duty to do—namely, to fight the enemy and, incidentally, to protect the ships which were engaged in trading to Great Britain and France. There is great weight in the defendants' argument. In the present war, above all others, the protection of merchant shipping from enemy attack has been a vital part of the successful prosecution of the war, and to encourage neutral shipping to trade with us and our allies, and to protect it in that trading, have been little less important than to protect our own shipping. In rescuing the *Borgila* and the *Svanfos*, no less than in attempting to destroy the submarine, *G* 7 was engaged in

(1) (1807) 6 C. Rob. 410, 413.
(2) 2 C. Rob. 299.
(3) (1802) 4 C. Rob. 156.
(4) (1803) 5 C. Rob. 54.
(5) (1810) Edw. 254.
(6) (1801) 1 Cranch, 1.

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an operation important to the success of our arms, and the rescue was only the effect of *G* 7 engaging the submarine. But having found that there was, in substance, a capture by the enemy submarine of the *Borgila* and *Svanfos*, I feel bound, upon the authorities, to regard their rescue by *G* 7 as a salvage service. The principle of salvage upon recapture is well established in our law. No doubt it grew up in the days when the Court had to encourage privateers. But, after privateering had been abolished, the award for salvage upon recapture of British ships by British ships of war was regulated by s. 40 of the Naval Prize Act, 1864, a section which, as I shall indicate later, is, in some respects, much out of date, but which is still law, and is based upon a recognition of the right of the commanders, officers and crews of King's ships to salvage upon recapture. And though strictly there was no recapture of the *Svanfos*, and though the *Borgila* was surrendered to the Norwegian torpedo-boat destroyer and could not therefore be brought before the Prize Court as a recaptured prize, yet, according to the authorities, the rescue was a salvage service, though rendered by a King's ship. In principle I am unable to distinguish the present case from a case like *The Edward and Mary*. (1) See also the judgments in *The Franklin* (2), and *The Pensamento Feliz*. (3)

It is, in my opinion, worthy of consideration whether, in the changed circumstances of modern warfare, King's ships of war and merchant vessels trading to the countries of the King or his allies should not be regarded as all engaged in the common enterprise of carrying on the war, and recapture or rescue by King's ships therefore recognized as a duty not only to the King, but to the owners of the property recaptured or rescued, as participants in the common enterprise. If so regarded no right to salvage would arise upon a recapture or rescue by a King's ship. See *The Belle*. (4) But it is not for me to alter the law. I must apply it as I find it.

I hold that the plaintiffs are entitled to a salvage award for having rescued the *Borgila* and *Svanfos* from the enemy

(1) 3 C. Rob. 305.
(2) (1801) 4 C. Rob. 147.
(3) Edw. 115.
(4) (1809) Edw. 66.

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submarine, which had reduced them completely into her power and was about to destroy them as prizes of war.

Next as to quantum. This is for the Court to determine according to its general principles. The Court is, in the present case, unfettered by statute. Sect. 40 of the Naval Prize Act, 1864, does not apply to foreign ships. As regards the *Svanfos*, there is the further reason that the section applies only where the property, having been captured, is actually retaken, and as to both ships the section contemplates the recaptured prize being brought before the British Prize Court and there restored on payment of salvage. I am not bound by s. 40. But ought I to regard the quantum fixed by that paragraph as a standard to be applied to analogous cases? Lord Stowell, in cases which were analogous, but not within the terms of the Prize Acts of his time, frequently made an award such as he would have been bound to make if the case had been within the terms of the Prize Acts. Sect. 40 fixes the award as one-eighth of the salved value, or, in special circumstances, as not exceeding one-quarter. The Prize Acts of the French Wars fixed it as one-eighth to King's ships and one-sixth to privateers. Lord Stowell thought this a niggardly proportion. See *The Apollo*. (1) But in his days, and even in the time of the Crimean war, and even in 1864, values afloat in any one bottom were small, and, compared with values to-day, very small. In Mr. Rothery's report in 1857 (Rothery's Prize Droits, edited by E. S. Roscoe, p. 140) values of 6000*l*. and 3000*l*. are spoken of as large. To-day such values are comparatively trifling. The values afloat in the *Borgila* and *Svanfos*, two small steamers, were, in one case little short of, and in the other over, 100,000*l*. The values of many ships afloat during the war, with their cargoes, must have been not far short of 1,000,000*l*. If such a British ship with British cargo had been captured by the enemy and retaken by a British man-of-war, the Court would have been bound, under s. 40, to award one-eighth to the commander, officers and crew. But no one can suppose that such an award would have been in accordance with the general principles of the

(1) 3 C. Rob. 308.

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Court. Moreover, the proportion of one-eighth was fixed at a time when the important element in all salvage was the personal service. The difference of one-sixth to privateers, where the owner had to be remunerated, as compared with one-eighth to King's ships, where the owner had not to be rewarded, illustrates this. The increase in the value of ships has gradually led to the value and risk of the salving ship, as the instrument of salvage, being treated as the more important element. And, in general, in modern days the greater part of any award is given to the owners and not to the master and crew. In my view s. 40 is so out of harmony with the modern applications of the principles of salvage, that I am not bound to treat it as in any way fettering me in the present case, or as giving me a guide.

I therefore endeavour to apply to this case the general considerations applicable to all salvages by the commander, officers and crews of King's ships, remembering that nothing must be awarded in respect of *G* 7 as an instrument of salvage, and remembering also that the commander, officers and crew were in the service of the King and were, so far as fighting the enemy was concerned, performing their duty, and performing it very well and with great courage. The value in the case of the *Borgila* is smaller than the values in the case of the *Svanfos*, but in the *Borgila* there was the additional service after the submarine was chased away.

I award to the plaintiffs, in the case of the *Svanfos*, the sum of 1000*l.*, and in the case of the *Borgila* 1200*l.*

I have only one other observation to make. It was argued that if this was a case of salvage at all it was a case of prize salvage and cognizable only by the prize court, and that the claim, as made, was for civil salvage, and was made on the civil side of this Division, and that on the civil side the Court cannot even consider the rescue from the enemy. I do not think there is anything in this objection. I am not saying that I agree that it is a case cognizable only by a prize court, but if it be, this Court is a Court of the Probate, Divorce and Admiralty Division, and it is to the Division, and not to a particular judge of the Division, that cases in prize are assigned

by s. 4 of the Judicature Act, 1894, and if any amendments are necessary in the form of the procedure I shall direct them to be made.

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Solicitors for the plaintiffs: *Thomas Cooper & Co., for Holt & Co., Navy and Prize Agents.*

Solicitors for the defendants: *Botterell & Roche.*

E. C. T.

ADMIRALTY.

1919

May 21.

THE CHYEBASSA.

[1918, fol. 629.]

Admiralty—Pilotage—Pilotage under Defence of the Realm Regulations—Pilot not Servant of Shipowners—Doctrine of Common Law—Effect of Pilotage Act, 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *s.* 15.

By s. 15, sub-s. 1, of the Pilotage Act, 1913, "notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory":—

Held, that the section has not merely the effect of abolishing the defence of compulsory pilotage in cases where the pilotage is compulsory under some public or local Act, but that it applies also to the case of a pilot compulsorily taken on board a ship under orders issued under the Defence of the Realm Regulations, and that the shipowners could not in these circumstances avail themselves of the common law defence that they were not responsible for the negligent acts of a person who was not their servant.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the Commissioners for executing the office of Lord High Admiral of the United Kingdom; the defendants were the owners of the steamship *Chyebassa.*

The collision took place on March 13, 1918, in the war channel in the neighbourhood of Orfordness, between the *Chyebassa* and H.M. mine-sweeping trawler *Adrian,* which was lying at anchor. The weather was very foggy. The

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Chyebassa, a steamship of 6249 tons gross, bound to Middlesborough with a cargo of ore, was in charge of a pilot taken on board under an order issued under the Defence of the Realm Regulations, which compelled all vessels (with certain exceptions, which did not apply to the *Chyebassa*) to take a pilot when navigating in the area in question.

The defendants pleaded that if, contrary to their contention, the collision was caused or contributed to by any negligence on the part of anyone on board the *Chyebassa*, such negligence was solely that of the duly licensed pilot who was on board and in charge of the navigation by compulsion of law, and was not the servant of the defendants.

Stephens K.C. and *Dunlop K.C.* for the plaintiffs.

Batten K.C. and *Dumas* for the defendants.

[In the course of the argument, which is fully set out in the judgment, *The Penrith Castle* (1) was referred to.]

ROCHE J., having found the *Chyebassa* to blame for excessive speed, continued as follows: There remains one point. Counsel for the defendants submits that the fault is solely the fault of the pilot, and on my findings I think that is correct. That being so, the following point of law has been taken: This collision happened on March 13, 1918. Sect. 15, sub-s. 1, of the Pilotage Act of 1913, which deals with the defence of compulsory pilotage, came into force at the end of 1917, and the plaintiffs' contention is that the defence which is set up in this case has ceased to exist by reason of the operation of that statute. I assume for the purpose of this judgment that pilotage was compulsory, and compulsory not by reason of anything in any local or general Act, but by reason of certain orders. Sect. 15 is as follows: "Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory." Counsel for the defendants has argued

(1) [1917] P. 209.

that the section ought to be read as abolishing defences of compulsory pilotage which are based on anything contained in any public or local Act, but not as abolishing the defence where it is based, as he says it is here, on a common law principle that the owners of the ship are not answerable in law for the misconduct or bad navigation of the pilot, because he is not their servant. In my judgment that contention is wrong. I think the answer to the contention is that the natural construction of that sub-section is that the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable as he would be if pilotage were not compulsory, and shall be so liable notwithstanding that there is anything in any local or public Act to the contrary. It is a wide abolition with a proviso ex abundante cautela that the abolition shall operate in spite of the fact that any local or public Act would, but for this section of the Act of 1913, have the effect of constituting compulsory pilotage a defence. Nor does it appear to be material to the abolition whether the pilotage is made compulsory by a public or general Act or by some other method.

For these reasons I decide that, notwithstanding that I have found the fault to be solely that of the pilot, the owners are responsible for the damage sustained by the plaintiffs in this case.

Solicitor for the plaintiffs: *The Treasury Solicitor.*
Solicitors for the defendants: *Waltons & Co.*

E. C. T.

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Feb. 10, 12, 13, 14, 17, 18, 19, 20, 24;
April 3, 14, 30.

(In Prize.)

THE DIRIGO, THE HALLINGDAL, AND OTHER SHIPS.

[1916, No. 1033; 1915, No. 873.]

Prize Court—Enemy Property—Contraband—Passing of Property—Declaration of Paris, Art. 2—Knowledge of Neutral Shipowner of Nature of Cargo—Condemnation of Ship—Interest on released Proceeds of Sale.

A quantity of goods of a contraband character, namely food stuffs and cattle feeding stuffs, were shipped by the American branch of a Frankfort firm on neutral vessels consigned to neutral firms in Scandinavia. It was alleged on behalf of the Crown: (*a*) that art. 2 of the Declaration of Paris (1) was intended only to benefit neutrals and therefore an enemy could not claim its protection for his goods, or, alternatively, that the article did not cover goods of a contraband nature even if they had not an enemy destination, and that such goods therefore were subject to condemnation; (*b*) that the doctrine of prize law, that property cannot pass from an enemy to a neutral during transit, applied, and that the goods still remained enemy property and therefore were liable to condemnation under (*a*), or, alternatively, to detention until the conclusion of peace or further order under the Reprisals Order in Council of March 11, 1915:—

Held (*a*), that art. 2 of the Declaration of Paris does not merely enure for the benefit of neutrals so that in effect only the neutral shipowner has the right to complain of the interference with the voyage of his vessel by reason of the seizure of the goods laden on board; the article protects the enemy goods themselves;

(*b*) that in the following classes of cases the doctrine that property cannot pass from an enemy to a neutral during transit does not apply:—(i.) where the goods are shipped under an f.o.b. contract on a vessel chartered by the neutral buyer, payment to be made against documents at the port of loading, and payment is made and all the documents handed over before the vessel sails; (ii.) where the goods are shipped on a general ship, not chartered by the buyer, under an f.o.b. contract including freight and insurance, or c.i.f., payment against documents at the port of loading, and payment is made and documents handed over before the ship sails; (iii.) where the same conditions exist, but payment is not made and the documents are not handed over till after the ship sails owing to the accidents of business and not because there is an intention to reserve the jus disponendi.

There is no general principle that where goods seized as prize are sold, and an order for release is subsequently made, the successful claimants are entitled to interest upon the money because the Crown has had the use of it.

(1) Declaration of Paris, art. 2. The neutral flag covers enemy's goods, with the exception of contraband of war.

Quære, whether, in the present state of the authorities, a neutral vessel is confiscable for carrying a cargo, a substantial portion of which is contraband, without knowledge on the part of the shipowner of the nature of the cargo.

ACTIONS for the condemnation of food stuffs and animal feeding stuffs as contraband.

The consignments in question were all shipped from New York on Scandinavian vessels between the autumn of 1914 and the early part of 1916. The shippers in each case were K. and E. Neumond or nominees on their behalf. The consignees were various Scandinavian firms. K. and E. Neumond were a firm of grain and feeding stuffs importers at Frankfort-on-the-Main. They also carried on business in New York and other places in the United States. The partners were Karl and Eugen Neumond, the New York business being managed by Karl Neumond. The relations between the Frankfort and New York businesses are fully stated in the judgment.

Sir Gordon Hewart A.-G., Sir Ernest Pollock S.-G., Clement Davies and *J. V. Nesbitt* for the Procurator-General. All the consignments shipped by K. and E. Neumond had an enemy destination; but if the Court should be of opinion that any of the shipments would have been consumed in Scandinavian countries, at all material times they were enemy property and liable to detention under art. IV. of the Reprisals Order in Council of March 11, 1915. (1) The American house of K. and E. Neumond must be regarded as an enemy firm.

(1) Art. IV. "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of his Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into court and dealt with in such manner as the Court may in the circumstances deem to be just.

"Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order."

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The Court must have regard to the effective control of the firm: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1); *The St. Tudno* (2); *The Hamborn.* (3) The effective control was German. Karl Neumond had not lost his German nationality or domicil. See *The Flamenco* (4); *The Hypatia.* (5) But, even assuming he had acquired an American domicil, his connection with the Frankfort house and the nature of the business he carried on gave an enemy character to Karl Neumond's American business. See Story's Principles and Practice of Prize Courts (Pratt's ed., p. 61) and *The Vigilantia.* (6) Assuming therefore that the goods were originally enemy property, it is submitted that in none of the claims had the property passed to the claimants before seizure. The property could not pass from an enemy to a neutral in transit, and the transit would begin at the warehouse in America and not merely when the goods were put on board. See *The United States* (7) and *The United States* (*No.* 2) (8); see also *The Baltica* (9) and Pratt's Story, p. 64.

If enemy property, it is further submitted that the goods were not entitled to the protection of the Declaration of Paris. The only statement made by art. 2 is that the neutral flag covers enemy goods except contraband. The object of that resolution was the protection of neutral shipping, to prevent the searching of neutral vessels on the high seas for enemy property—i.e., the goods are free under the Declaration from capture at sea but not from condemnation in a prize court if the carrying vessels have been brought in for other legitimate purposes and the goods have been seized. The only person that can complain in effect is the neutral shipowner—as in cases of the infringement of neutral rights by captures made in neutral territorial waters. The enemy owner cannot claim the benefit of the Declaration. The Declaration was merely in favour of those neutrals who accepted it. See Bonfils' Droit International Public, 7th ed.,

(1) [1916] 2 A. C. 307.
(2) [1916] P. 291.
(3) [1918] P. 19.
(4) (1915) 1 Br. & Col. P. C. 509.
(5) [1917] P. 36.
(6) (1798) 1 C. Rob. 1, 12.
(7) [1917] P. 30.
(8) (1917) 2 Br. & Col. P. C. 525.
(9) (1857) 11 Moo. P. C. 141.

pp. 950 et seq.; see also the French Instructions in the War of 1870 (Snow's Cases on International Law, p. 568). It was not the practice to ask for the condemnation of enemy goods laden on neutral vessels under the Reprisals Order in Council of March 11, 1915, but there was nothing to preclude the Crown applying for their condemnation, and under the Order in Council of February 16, 1917, "to restrict further the commerce of Germany," it has been the practice of the Crown to ask for condemnation, although the Order itself does not mention enemy property as a ground of condemnation. See *The Leonora*. (1) If enemy property were not subject to condemnation by international law under the Declaration of Paris it would have been specifically included in the Order of February 16. Alternatively, the exception of contraband of war from the protection of the Declaration covers goods which are in their nature contraband: it is not necessary to bring goods within that exception that they should have the destination necessary to secure their condemnation as contraband.

Sir Erle Richards K.C. and *Darby* for claimants in respect of goods on the *Alfred Nobel*, the *Björnstjerne Björnson*, the *Fridland*, the *Gerd* and the *Urna*.

Sir Erle Richards K.C. and *Balloch* for the claimants in respect of goods on the *Hallingdal*.

Mackinnon K.C. and *C. R. Dunlop* for the owners of the *Dirigo*.

Balloch, *Sir Robert Aske* and *A. W. Grant* for various other claimants.

Karl Neumond's domicil was American. The test is, where was the business carried on? See per Lord Lindley in *Janson* v. *Driefontein Consolidated Mines*. (2) The same test is applied in the Trading with the Enemy Proclamations. None of the goods, therefore, even if the property in them was still in K. and E. Neumond at the date of seizure, were enemy property. But it is submitted that in all cases the property had passed to the consignees in accordance with the intention of the parties. It had clearly passed according to municipal

(1) [1918] P. 182. (2) [1902] A. C. 484, 505.

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law, and, even assuming that the American house of K. and E. Neumond is to be regarded as an enemy firm, the old rule laid down in *The Baltica* (1) and similar cases as to the passing of enemy property in transitu, has no application to ordinary bona fide commercial transactions. The old rule was framed long before confirmed credits could be opened by telegram, and the contracts of sale such as those now in question were unknown in the days of Lord Stowell. Different considerations should be applied nowadays to contracts of sale entered into before shipment, and when bona fide they should be upheld according to the intention of the parties, as in the case of ante bellum contracts. See *The Parchim.* (2)

The goods had not a contraband destination, even if enemy property, and are clearly entitled to the protection of the Declaration of Paris. The Crown's argument on this question is entirely novel and wholly against the history which led to the Declaration being agreed upon. Up to the time of the Crimean War there were two schools of thought, the sea powers maintained that enemy property in neutral vessels could be confiscated, the land powers maintained the contrary. If the Crown's contention were right the controversy still remains unsettled; because if the Declaration is merely for the protection of neutral ships and does not extend to the goods, while British prize Courts would condemn enemy goods, the prize Courts of foreign nations which adhered to the continental view would let them go free.

The fact that even under the terms of the Reprisal Order in Council the Crown did not seek to condemn enemy property as such shows that this doctrine now put forward for the first time is quite untenable. Hundreds of detention orders have been made under that Order in which, on the Crown's contention, condemnation orders should have been made. "Contraband" in the Declaration clearly means a contraband, i.e., an enemy, destination, and not merely goods of a contraband character in the sense of being on the contraband list.

Sir Gordon Hewart A.-G. replied.

Cur. adv. vult.

(1) 11 Moo. P. C. 141.

(2) [1918] A. C. 157.

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April 14. THE PRESIDENT (LORD STERNDALE). In these cases the Crown asks for condemnation of a number of shipments carried in several different ships. The value of the property is large—over 280,000*l*. There are twenty-three consignments carried in thirteen ships, and one whole cargo and the ship carrying it : in all twenty-five claims put forward by twenty-two claimants. All the goods carried are food stuffs or cattle feeding stuffs.

The link between the various cases is that the shippers in all cases, either nominally or actually, were a firm of K. and E. Neumond, and it is alleged that this firm was an enemy firm engaged in providing Germany and the German Government with contraband goods, and that in all the shipments with which this case is concerned the goods were destined for Germany and were liable to condemnation as conditional contraband. Even if this were not established, it was contended that the goods were liable to condemnation as enemy property, or to detention under the British Reprisals Orders.

The circumstances of the different shipments were by no means the same, but the character of the shippers, K. and E. Neumond, was common to them all, and it will be well, therefore, to examine this in the first place.

The firm of K. and E. Neumond is a firm of grain and feeding stuffs importers and dealers at Frankfort-on-the-Main. They also carried on business at New York, St. Louis, New Orleans and Galveston, and after the beginning of the war they opened an office in Copenhagen. The relationship between the Frankfort and American houses will be considered in more detail later. The partners in the business were Karl and Eugen Neumond, and the business in New York was opened in 1911 or 1912 under the management of Karl, the elder brother.

At the outbreak of war Karl was in Germany, but he went back to America in September, 1914, having made arrangements with Ludwig Eyber, an official of the War Ministry, to ship grain and flour to Copenhagen to be forwarded to Germany. This was done with the official support of the German Government, and before the end of November, 1914,

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large shipments of grain and flour had been sent to Germany in pursuance of this arrangement.

In the meantime Karl Neumond had met Dr. Albert, Counsellor of the Ministry of the Interior of the German Empire, who was in America as a member of an official commission for the purpose of purchasing supplies and making financial arrangements for Germany. Other members of the commission were Dr. Dernburg, Dr. Meyer Gerhardt and Prince Hatzfeld. Herr Albert, in purchasing supplies, acted with or on behalf of the Zentral Einkaufs Gesellschaft (called the Z.E.G.), which was a company established to centralize the import of a number of commodities, chiefly foodstuffs and fats, and had very large powers conferred upon it by the German Government for that purpose. After a short time Karl Neumond acted on behalf of Albert and the Z.E.G. instead of Eyber. The business was financed by credits opened by the Disconto Gesellschaft, of Berlin, and no doubt the money was found by the German Government, for when purchases on behalf of Eyber had not exhausted the credit, the balance was allocated to purchases on behalf of Albert and the Z.E.G.

Eugen Neumond remained at Frankfort, except for business visits in Germany and Scandinavian countries, until he was called up for military service in 1916. He obtained several postponements of his service and subsequent periods of leave for business, and his applications were supported by Dr. Albert, by Count von Bernstorff, and by the Reichsbank and other bankers in Germany, on the ground of his utility in obtaining goods for that country.

K. and E. Neumond used cover names in communicating with each other and with other persons, and shipped goods in names other than their own in order to conceal the fact that they were the shippers. Sometimes they used the names of persons who were sellers to them of the goods, sometimes the names of other firms who had no connection with the transactions at all. In some cases they had authority to use these names ; in others they had no authority whatever, and shipped goods in the names of firms who knew nothing of the matter.

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In 1916 the firm organized a system of secret or private mail service between New York and Germany via Scandinavia for the benefit of themselves, Albert, the Z.E.G. and the German banking houses and others concerned in the business. Special couriers carried the mails, and the firm's offices in New York and Copenhagen were used as sorting offices. This business was carried on until the United States entered the war, when Karl Neumond was interned as a dangerous enemy.

The head office of the firm was in Frankfort, and the houses in the United States and Copenhagen were, in my opinion, only branches of that firm. They are described as being quite separate in some of the letters passing between Frankfort and America, and in the sense that the accounts of the operations of the branches were separately kept, it is a correct description; but these branches accounted for their profits to the Head Office in Frankfort, and the direction of the business generally rested with that office. In my opinion, the business was an enemy business, although part of its operations was conducted in neutral countries, and the case is not similar to that mentioned in some of the authorities of a person or firm carrying on different businesses in enemy and neutral countries respectively. I think, therefore, that goods shipped by this firm were enemy property.

The evidence with regard to the firm and its operations was very voluminous. It consisted of a long affidavit on behalf of the Crown, derived from the usual sources, and a very large number of intercepted wireless messages, cables and correspondence. The latter were almost entirely in cipher and code, and had been deciphered and decoded at the cost of a great deal of labour with the greatest ability and ingenuity by Mr. Gaskoin, a witness from the Postal Censor's office. Fortunately, opportunities occurred which made it possible for him to verify his translation of the intercepted communications on some occasions; and I have no doubt that it was substantially correct. As about three days were necessarily occupied in reading these communications to me, I have not thought it necessary to set them out in any detail.

It will, I think, be apparent from what I have stated that

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the greatest suspicion must attach to any transactions in which K. and E. Neumond were concerned, and that there is a strong presumption in favour of the goods concerned in such transactions being contraband. It must however be remembered that the firm had an extensive business before the war, and that it is not shown that they gave up business with Scandinavia and confined themselves entirely to contraband transactions afterwards. It is therefore possible that they may have entered into contracts with, and consigned goods to, neutrals for the purpose of their own consumption or business, and, as will be seen later, some of the transactions in this case, especially of feeding stuffs as distinguished from food stuffs, were of that nature.

Turning now to the different shipments, I think the first four, i.e., one by the *Alfred Nobel*, one by the *Björnstjerne Björnson*, and two by the *Fridland* (one of wheat and one of flour), may be taken together. Two of the shipments were made in the name of the Guaranty Trust Co. of New York, and two in the name of Norris & Co. from whom the goods were bought; but in all the cases the real shippers were K. and E. Neumond. In the case of Norris, K. and E. Neumond made it a condition of the sale that Norris should secure war risk insurance in American companies in their own name and should also allow the goods to be shipped in their name. A similar proposal for a further transaction was afterwards made to Norris & Co., but they refused to entertain it on account of the suspicious nature of the transaction.

In the case of the *Alfred Nobel* a joint claim was put in by the Guaranty Trust Co. and K. and E. *Newman* of New York—another name for K. and E. Neumond: in the case of the *Björnstjerne Björnson* and the *Fridland* by the Guaranty Trust Co. and Norris & Co. for two shipments, and the Guaranty Trust Co. alone for the other shipment. No evidence however was filed by K. and E. *Newman* or by Norris & Co., and the only effective claim in all the cases was by the Guaranty Trust Co.

In the case of the *Alfred Nobel* the claimants put in a contract by K. and E. *Newman* to Beckmann and Jörgensen,

c.i.f. Copenhagen, payment on arrival, but the bill of lading stated the shippers as the Guaranty Trust Co. and made the goods deliverable to their order. The claim stated the contract to be made by K. and E. *Newman* as the agents for the claimants, but no such statement was contained in the affidavit filed on their behalf, and in my opinion there was no foundation for it. The affidavit merely alleged that they were holders of the bill of lading and so had control of the goods.

In the case of the shipments by the *Björnstjerne Björnson* and the *Fridland* no contracts were produced, and the only allegations in the affidavits were that the claimants held the documents relating to the goods. There was no allegation in the claimants' evidence in any of the cases that the goods were the property of the claimants.

Looking at the evidence and the well-known nature of the claimants' business, I am of opinion that the highest at which their case can be put is that they held the documents relating to the goods to secure some interest arising from advances or payments made in respect of them; and *The Odessa* (1) shows that such an interest gives them no right to a claim in this court. The claims must be dismissed with costs. Considering the history of the firm of K. and E. Neumond and the nature of their transactions, I have no doubt that these goods were intended for Germany, and I find that in a letter, probably written in March, 1916, by K. and E. Neumond to the War Ministry in Berlin, they assure the Ministry they will do everything to secure a favourable result of the prize proceedings in respect of the goods. This fact coupled with the connection previously mentioned of the firm with the Z.E.G. and the German Government, makes it clear that these goods were destined for the enemy Government, or their armed forces, and they must be condemned as good and lawful prize.

The next case with which I shall deal is that of the *Henrik*. In this case the goods were shipped in the name of G. W. McNear Inc., but really by K. and E. Neumond. The consignees were the Spannmals Konstgodnings och Foderamnes A/B., of Ystad, and a claim was entered by Simonsson and

(1) [1916] 1 A. C. 145.

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Hallberg of Stockholm. These claimants however failed to comply with an order for security and the claim was struck out. No claimant therefore appeared before me. The intercepted documents establish that these goods were sent by K. and E. Neumond and were under their control, and that McNear and Simonsson and Hallberg were persons acting under their directions.

[His Lordship read some of the correspondence and continued :] There can be no doubt that these goods were sent with the same intention and to the same destination as those previously condemned, and they must also be condemned as good and lawful prize.

I shall now deal with the case of the *Dirigo*. In this case the Crown asks for the condemnation of the ship as well as the cargo.

The cargo consisted of 83,048 sacks of barley, the whole cargo of the ship. It was shipped in the name of M. H. Houser on behalf of K. and E. Neumond, and consigned to A/B J. Bruun at Kalmar, and was claimed by the consignees. The claim was made on the ground of a sale to the consignees ; but the Crown contended that there was no real sale to them, and that they were only acting under the direction of Neumond. It appears from a number of intercepted messages which it is unnecessary to set out that the insurance on this cargo was all arranged in Frankfort by Neumond, but it was contended that this was not known to the claimants who had not by the terms of certain letters which they produced (though by the formal contract they had) to undertake the war insurance.

[His Lordship read a number of other letters and continued :] I cannot on these materials come to any conclusion but that the claimants were mere nominees of K. and E. Neumond, and that these goods were intended by that firm for the use of the German Government ; and they must be condemned as good and lawful prize.

It may be noted that these transactions were financed through the Disconto Gesellschaft of Berlin.

I now come to the cases in which there are claims which present much greater difficulties. Speaking generally they

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present these differences from the cases with which I have so far dealt. With one exception they are concerned with feeding stuffs as distinguished from food stuffs, and they are not financed by the Disconto Gesellschaft or other German banks, and the Guaranty Trust Company, which was concerned in the other cases, does not seem to be concerned with these.

The first with which I propose to deal is that of the *Hallingdal*. This consignment consisted of a cargo of 25,441 sacks of cotton seed cake shipped by K. and E. Neumond to Eriksen and Christensen at Nörresundby. The claimants were Peder P. Hedegaard and Hans P. H. S. Larsen. Hedegaard bought the cargo from Eriksen and Christensen on joint account with Larsen, and they alleged that they had bought it for sale and use in Denmark. Complaint has often been made in this court that claimants do not in their evidence give full information as to the transactions in question. In this case there can be no complaint on the ground of quantity, for the claimants have filed close upon 500 pages of affidavits and documents in support of their case, containing, so far as I can see, the communications between all the parties concerned in the business. It would be idle to examine this mass of documents in detail; they show all the little differences and negotiations between the various parties that would naturally arise in a genuine transaction, and it was not denied that on the face of them they showed a bona fide case and supported the claimants' claim. It is the fact that documents have been fabricated for the purpose of deceiving this Court, but they have not been of the nature of this correspondence, and although it may be conceivable that it might have been fabricated, it is so improbable as to be hardly worth considering. It must also be considered that there is nothing but the character of Neumond, the shippers, which in any way contradicts or throws doubt upon the claimants' case; there is nothing incriminating in the intercepted documents, and no connection of the claimants or their vendors with contraband transactions is suggested by the Crown. I have no hesitation in accepting the claimants' evidence, and therefore I find that these goods were bought for neutral consumption and had no enemy

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destination. There remains a question as to whether they still continue, according to prize law, the property of the enemy firm of Neumond; and as this is a point which arises with regard to many other shipments, I defer its consideration for the present.

The next claim is in respect of shipments on board the *California*, and in some of these cases, as in several others, the claimants had been paid by their underwriters. An application was made to me to add the underwriters as co-claimants, or to substitute them. This was opposed by the Crown as unnecessary, because this Court would not take notice of the claims of underwriters. There was no evidence in any of the cases that any enemy underwriters were concerned, and I do not think it necessary that the underwriters should be joined. If it were necessary an order should be made so joining them.

[His Lordship then dealt with various consignments on the *California* and other ships, and said that he found in these cases that the purchasers bought bona fide for consumption in neutral countries. His Lordship continued as follows:] It will be seen that these cases present several similar features. In most of them the goods consigned are comparatively small lots of feeding stuffs such as would naturally be bought by persons carrying on the business of the claimants for their ordinary legitimate trade. Though no doubt feeding stuffs would be useful and acceptable to Germany, there is no statistical case of excessive imports into Scandinavia made in respect of them as in respect of food stuffs, and all the finance of the transactions is carried out through Scandinavian banks, while the Disconto Gesellschaft and the Guaranty Trust Company, who are so prominent in the cases of the contraband shipments, do not appear in any way in these cases. In all of them, too, there is nothing incriminating in the intercepted documents or in the history of the claimants, so far as the Crown has ascertained it. It is true that in many of the cases, the shipments, though really by Neumond, are made in other names; but often this was not known to the claimants till some time after the contracts had been made, and in any

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case that fact does not in my opinion prove any bad faith on the part of the claimants.

The case of the shipment to the Baltic Company on the *Florida* stands on a different footing. In the first place, it is a shipment of wheat flour and not of feeding stuffs, and therefore the statistical case is applicable to it which shows a large import of food stuffs into Scandinavia for the purpose of being forwarded to Germany. Then, though I do not attach much importance to it, there is no formal contract in this case, but the agreement is contained in letters. Again, the transaction does not go through in the ordinary way. The sale was c.i.f., war risk for buyers' account: and yet the purchasers insured against marine as well as war risk. This they say they did because they wanted the goods covered against all risks, which could not be done in America, and therefore they effected the insurance in Denmark on account of the sellers. In accounts sent by Neumond, Frankfort, to Neumond, New York, in February, 1916, there are entries which, in the absence of explanation, seem to refer to this case.

[His Lordship dealt with the evidence and said that the claimants had not shown that Neumonds were not directing the transaction, and he accordingly condemned the goods with costs. His Lordship continued as follows:]

An important question was raised by the Crown as to the right order to be made if the property still remained in K. and E. Neumond, an enemy firm. It was contended that in that case the goods should be condemned as prize, and the ground of the contention, as I understand it, was that under the Declaration of Paris enemy goods carried under a neutral flag were still liable to condemnation even if not contraband. It was argued that the Declaration of Paris was made in the interest of neutrals, and that they alone acquired any rights under it, and therefore its only effect was to give the neutral shipowner a right to complain of the interference with his voyage by the seizure of the enemy property. He is still subject to the rights of search, and according to the argument the enemy goods may still be seized and be taken from his ship;

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and as this is a legitimate exercise of a belligerent's right it is difficult to see what advantage is gained.

I doubt very much whether this point is really open to me, as it has been dealt with by the Privy Council in the case of *The Hakan*. (1) In that case Lord Parker said: "It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods. See the Declaration of Paris. The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances, the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship." This is no doubt only a dictum and not necessary for the decision of the case; but it is a considered dictum of the Privy Council, and I should probably consider myself bound to follow it, even if I did not agree with it. I wish, however, to say that, speaking with all respect, I entirely agree with it. I failed to get any satisfactory answer from any of the counsel for the Crown to the question, if their contention be right, what is the practical effect of that section of the Declaration of Paris? Again, if that contention were right, a very great number of orders made by the late President and by myself following his decisions, in which under the Reprisals Order enemy property was ordered to be detained with a declaration that it was enemy property, were entirely wrong, and orders for condemnation should have been made. All these orders were made at the instance of the Crown. It is also difficult to see the utility of making the Reprisals Orders, so far as enemy

(1) [1918] A. C. 148, 150.

property is concerned, when there is no enemy destination. These Orders gave rights to detain such property; but if the argument of the Crown were sound, they were already liable to the greater penalty of condemnation. These considerations, however, may be said to be only matters of prejudice, and it was argued that the point may be a good one though the Crown had accepted a lower right in previous cases.

The contention seems to me to be opposed to the plain words of the Declaration of Paris. In order to accept it the words must be read something in this form: the neutral flag covers enemy goods so far as concerns the interest of the neutral shipowner. I can find no such limitation. There may, of course, be a practical difficulty in the enemy owner appearing to assert his rights, but that difficulty is dealt with by Lord Parker in the passage which I have already read from *The Hakan*. (1) The contention also seems to me to be entirely contrary to the history of the matter. This is shortly stated in Hall's International Law, 7th ed., pp. 751 ff., and shows that the whole dispute was whether enemy goods on neutral ships should or should not be liable to seizure. The Declaration of Paris, by its preamble, states that it was intended to settle the long-standing dispute, and it could only be settled by an agreement that such goods should or should not be so liable. In my opinion the meaning is that such goods should be exempt from seizure; and if such were not the meaning, I can see no practical use in the Declaration at all. I am told that the point was argued before the late President in a case in which judgment was not delivered, but until that time it does not seem to have occurred to anyone.

Assuming, therefore, that these goods still remained enemy property, no order of condemnation can be made, as I have found that they have not an enemy destination, and therefore did not fulfil the condition that would make them contraband. I do not accept the argument that to make them contraband under the Declaration of Paris it is sufficient that they should be on the list of conditional contraband. If the condition be not fulfilled they are not contraband.

(1) [1918] A. C. 148.

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In the circumstances now existing with regard to hostilities, the question of detention is not a very important one; but I think it well to examine whether these goods did still remain enemy property. This depends upon whether the doctrine of prize law that property cannot pass from an enemy during transit applies to these cases.

They divide themselves into three classes: (1.) Where the goods were shipped upon a vessel chartered by the purchaser and payment was made and all documents handed over before the vessel sailed, the contract being f.o.b., payment to be made against documents at the port of loading; (2.) where the goods were shipped on a general ship, not chartered by the purchaser, under a contract f.o.b. including freight and insurance, payment against documents at the port of loading, or c.i.f. with the same provision as to payment, and payment was made and the documents handed over before the vessel sailed (in all cases war risk was excluded and was on account of the purchaser, but this is not material); (3.) where the same conditions existed, but payment was not made and the documents not handed over till after the ship sailed, because of the accidents of business, and not because there was any intention to reserve the right of disposition. If the documents were retained with such an intention, I think that the property would not pass till after the transit had begun, and the prize rule would apply.

The only case of the first class is the *Hallingdal*. In my opinion in this case the prize rule does not apply. The intention of the parties clearly was that the property should pass before the ship sailed, and municipally it undoubtedly did pass. Two reasons for the prize rule were given in an often quoted passage from the judgments of Sir T. Pemberton Leigh in *The Baltica*. (1) "In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to

(1) 11 Moo. P. C. 141, 146.

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be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end. The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be in transitu till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner." This was cited with approval by the late President in *The Southfield.* (1)

In my opinion neither of these two reasons applies to this case. The ship had not incurred the risk of putting to sea when the property passed, and in the judgment in *Turner* v. *Liverpool Docks Trustees* (2) I find this passage: "There is no doubt, that a delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery." Here the ship was the purchaser's own ship for the time, and the seller, so far from imposing special terms restricting such delivery, had handed over all the documents and given complete control to the purchaser before the vessel sailed. It was, however, argued that the transit began at the seller's warehouse, or the place, wherever it was, from which the goods came; and the case of *The United States* (No. 2) (3)

(1) (1915) 1 Br. & Col. P. C. 332. (2) (1851) 6 Ex. 543, 567.
(3) 2 Br. & Col. P. C. 525.

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was cited in support of this view. The circumstances of that case were so different, and this point so clearly not present to the learned President's mind, that I do not consider it an authority. I do not lay it down as a general proposition that the transit can never begin till the vessel sails; the circumstances of each case must be considered; and in this case I think it did not. The words "before shipment" used in Pratt's Story at p. 64 were also pressed upon me, but the same passage speaks of "during the voyage and in transitu"; and the learned author was evidently dealing with a case in which the shipment was for the purpose of sending the goods on the voyage before the property had passed. In the case of the *Hallingdal* therefore I think there must be an order of release.

The second class of cases is not so strong, as in them the vessel was not chartered by the purchaser but was a general ship in which the seller had engaged room. See *The Parchim.* (1) In such a case, however, the master who signs the bill of lading becomes the bailee for the person named in it—in these cases the purchaser—unless there is something to show that such was not the intention. In these cases the clear intention of the parties was that the property should pass to the purchaser before the ship sailed and that from the time of its passing the goods should be at the risk and under the control of the purchaser; and when payment was made and the bills of lading handed over the enemy seller had no more concern with them. This took place while the vessel was still lying in the neutral port, and although the cases are not so strong as that of the *Hallingdal* I think the same reasoning applies and that these goods also should be released.

The third class of cases is the most difficult of all and it is one on which I have had great doubts. In one case it arises in a very marked way, i.e., in the shipment by the *Urna*. This shipment was made under the same contract as that by the *Gerd*, and the whole quantity was intended for shipment on one ship but afterwards made on two for convenience. In the case of the *Gerd*, the documents were handed over and

(1) [1918] A. C. 157.

payment was made before, in the case of the *Urna* after, the ship had sailed; and it is difficult to think that under the same contract the property was intended to pass in the one case and not in the other. In this case, as in all the others in which the documents were not handed over until after sailing, they were not withheld by the shipper with any intention of reserving the disposition of the goods, in which case the property would not pass until they were handed over, or even of maintaining a lien. The explanation is given by Mr. Morch, a director of the Baltic Co., in his affidavit, where he says: "My business experience enables me to say that when a credit is provided shippers are in practice content to put the goods on board on the faith of the credit knowing that when the bills of lading are signed they have only to present them to the bank in order to obtain the money. Moreover, when a credit is provided it is not necessary even as a business precaution that the documents should be presented before the ship sails, because the money is available whether the documents are presented before or after the date of sailing. It often happens that the ship sails so soon after the goods are shipped that although the documents are presented and paid in due course of business routine they may not be actually paid until after the ship sails, but the obligation to pay them exists from the time the cargo is loaded and the goods are at the risk of the buyers from that time. On the other hand the buyers are entitled to demand the delivery of the documents on tending the contract price."

In these cases also I have come to the conclusion, though with great hesitation, that as the documents were not handed over before the vessel sailed from the accidents of business and not with any intention of reserving a disposition, they stand upon the same footing as the second class and that the goods must be released.

The question of when the property passes is one of the intention of the parties, and I think that here the intention was that it should pass when the goods were appropriated to the contract by putting them on board the ship, and that the master from that time held the goods as bailee for the person

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named in the bill of lading, and that therefore there was delivery. This is, I think, also indicated in some cases by the contract being f.o.b., though qualified by including freight and insurance, but if this fact stood by itself, I should attach little importance to it. These cases seem to me to differ from those in which the ship sailed with the goods still the property of the enemy and the transfer took place at sea, and to be more analogous to those mentioned in *The Baltica* (1) of sales in a neutral or enemy port, though I think the Court was there alluding to sales completed before shipment. I mention, to show that I have not overlooked it, the argument that transactions like these may be merely colourable or fraudulent sales. That is true, and the same argument would apply to such sales as are mentioned in *The Baltica* (1) in a neutral or enemy port. Every sale wherever made may be fraudulent or colourable and would then be disregarded, and these are no more open to that consideration than others, and stand on a different footing from sales made when the goods are at sea and no delivery can be made.

In all these cases, therefore, except the *Alfred Nobel*, the *Björnstjerne Björnson*, the *Fridland*, the *Henrik*, the *Dirigo* and the *Florida*, I make orders for the release of the goods; but there was clearly very good reason for bringing the cases before the Court, and I make no order as to costs in respect of them.

The only remaining question is whether the ship *Dirigo* is liable to condemnation. She was owned by G. W. McNear, Inc., and was claimed by them. If my judgment as to her cargo be correct, the whole of it was contraband, and the Crown asked for her condemnation on that ground alone according to the judgments of the late President in *The Hakan* (2), and *The Maracaibo*. (3) In my judgment lately given in *The Zamora* (4) I expressed the opinion that, in view of the judgment of the Privy Council in the former case (5), I thought it well not to act on that contention, but

(1) 11 Moo. P. C. 141.
(2) [1916] P. 266.
(3) [1916] P. 284.
(4) Lloyd's List, April 2, 1919.
(5) [1918] A. C. 148, 152.

to examine whether there was knowledge on the part of the owner of the nature of the cargo, and I propose to adopt that course in this case. I hope that in some case the question whether, irrespective of knowledge, the fact that a large proportion of the cargo is contraband, and if so, what proportion, is a ground of condemnation of the ship may be decided by the final Court of Appeal.

There are in this case other circumstances to be considered. In the first place, the cargo on the *Dirigo* at the time of shipment still remained the property of McNear, Inc., the owners of the vessel, and this was held in *The Neutralitet* (1) to be an important circumstance. In *The Hakan* (2), Lord Parker, referring to *The Neutralitet*, (1) said: "It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *The Neutralitet*. (1) 'The modern rule of the law of nations is, certainly,' he says, 'that the ship should not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But the rule is liable to exceptions: where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one.' It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in *The Neutralitet* (1) creates a third exception. It should be observed, too, that in a

(1) (1801) 3 C. Rob. 295. (2) [1918] A. C. 148, 152.

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later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship." I am not quite sure that this passage applies fully to a case where the shipper has sold the goods to a purchaser who has the full control over them, and the goods only remain his because the documents have not been presented and the property has not passed.

Again the shipment was made in the name of M. H. Houser, who had no interest in the goods and was paid by McNear for the use of his name. This of itself would perhaps not be very important, but McNear also persuaded Houser to make an affidavit that the goods were his property, and included that affidavit among the ship's papers. McNear's explanation to Houser, that as the shipments were made in his name he was the owner until he received payment, is entirely unsatisfactory, for Houser had no payment to receive except that for the use of his name.

The *Dirigo*, too, was not the only ship owned or chartered by McNear in which contraband goods were carried. The *Dunsyre*, which sailed in April, 1915, was captured, in all probability collusively, by the Germans in July, and the cargo was delivered to Neumond of Frankfort and the ship released. The *Andrew Welch* was prevented by the Swedish authorities from reaching Germany or being captured, but 90 per cent. of the cargo reached Germany. The *Prins Valdemar* was captured—again in all probability collusively—and the cargo was delivered to Neumond of Frankfort. The ship was released and sold by McNear to the Z.E.G. The *Henrik* with which I have dealt in an earlier part of this judgment was intercepted, and in a letter from Neumond, New York, to Neumond, Frankfort, of March 10th, 1916, there occurs this passage: "McNear has so far done whatever we asked him, and we do not think he will leave us in a hole regarding the claim to be made in London." [His Lordship read a number of other letters and continued:] I think the facts which I have stated point clearly to the conclusion that the claimants knew quite well that these goods were contraband

intended for Germany, and that the *Dirigo* must be condemned as good and lawful prize with costs.

April 30. *Sir Erle Richards K.C.* and *Balloch* for claimants in respect of released proceeds of sale of goods laden on the *Hallingdal* applied for interest. The claimants paid for the goods in November, 1915, they were seized on December 21, 1915, and were sold by the Admiralty Marshal under an order of the Court in April, 1916. The Crown therefore has had the use of the claimants' money for three years and the claimants should be entitled to the profit made out of the proceeds of their goods. See *The Kronprinz Gustaf Adolf.* (1)

Clement Davies for the Crown. *The Kronprinz Gustaf Adolf* (1) laid down no general principle and is not an authority for the claimants' contention. It was a claim for damages, and in the particular circumstances the Court, being of opinion that the Crown had detained the goods too long and ought not to have brought the case to trial, awarded the claimants interest by way of damages. In the present case it has been specifically found that the Crown was entitled to bring the facts before the Court.

THE PRESIDENT (LORD STERNDALE): I do not think I ought to make any order in this case. From some of the language of the late learned President in *The Kronprinz Gustaf Adolf* (1) it would seem that he meant to lay down a rule that wherever the Crown had the benefit of the money they ought to pay interest to the claimant, when an order of release was made. But I do not think that he did intend to lay down such a general rule; and I cannot see that to do so is in any way consistent with the numbers of orders that have been made in this court for the release of the proceeds of goods, without any interest having been given.

The learned President certainly thought, in that case, that the Crown had pursued the case further than they ought to have done. But it was not upon that ground that he gave interest. I do not think he did give interest as damages; but he gave interest because he thought in all the circumstances of the case, there was such a hardship upon the claimants,

(1) (1917) 2 Br. & Col. P. C. 418.

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that he ought to do something to mitigate it; and he mitigated it by giving them interest upon the money.

It is by no means clear to me that the claimants in this case might not have been in a very much better position by these goods having been sold and the proceeds paid into court, than they would otherwise have been. It does not follow that if the goods had been retained they would necessarily have been worth as much at the time of release as at the time of sale. I think on the facts, as they turned out, probably they would have been; but it does not necessarily follow.

The question whether these goods ought to be released or not was a difficult question, and one which the Crown had a perfect right to have investigated by the Court. I can see no reason why the claimants should be in a better position than if the goods had still remained in the same condition as they stood at the date of seizure. They would then have had no claim for compensation, although there might have been considerable loss.

Unless it is to be laid down as a general principle that wherever goods are sold and the money comes into the hands of the Crown, and an order of release is afterwards made, the claimants are to have interest upon the money because the Crown has had the use of it, there are no special grounds in this case for allowing interest. I do not think such a general rule as that can be laid down. I think the whole of the decision of the late President is governed by these words: "It is to be regretted that the claimants have suffered inconvenience and loss, but these consequences are in such times often unavoidable. While I cannot give them damages as for capture without lawful cause, I deem it right, having regard to all the circumstances, to make an order which will mitigate their loss to some extent."

I do not think there are any circumstances in the case before me now which make it right for me to order compensation by way of interest upon the money, and I make no order.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the claimants: *Botterell & Roche; Thomas Cooper & Co.*

E. C. T.

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May 16.

Soldier's Will—Testamentary Intention—Codicil—Letter containing Instructions to alter Will—Power to make Will of Personalty only—Instructions relating to Real Estate also—Gifts dependent on each Other—Wills (Soldiers and Sailors) Act, 1918 (7 & 8 *Geo.* 5, *c.* 58), *s.* 3—*Death before Act.*

It is not necessary for the validity of a soldier's will that he intended to make a will at that time. It is enough if he intended deliberately to express his wishes for the disposition of his property after his death. A letter giving instructions for the alteration of a will may therefore be proved as a codicil. But if the soldier died before the Wills (Soldiers and Sailors) Act, 1918, came into operation, and the letter deals with real as well as personal estate, it will not be admitted to probate unless the gifts of personal estate can be proved to be independent of those of real estate.

Dalrymple v. *Campbell* [1919] P. 7, *Gillow and Orrell* v. *Bourne* and *Tudor* v. *Tudor* (1831) 4 Hagg. Ec. 192, 199, n. followed.

Frederick Tyrell Godman, the testator in this action, was a Managing Director of Whitbread & Co., Ld., and lived in a house purchased from his father's executors, called Little Ote Farm, Wivelsfield, Sussex. He made a will dated August 12, 1915, and thereby gave his wife a legacy of 200*l.* and all his household furniture and effects, including live and dead farming stock, absolutely. He gave his jewellery to trustees in trust for his wife during her life, and after her death for his sons in equal shares. He gave his wife during widowhood an annuity of 500*l.*, to be reduced to 250*l.* on second marriage, and the house he resided in. Subject thereto he gave the house to the eldest of his sons then living who should attain 21. And he gave the residue of his estate to trustees in trust for sale and to hold the proceeds in trust for all his children living at his death in equal shares. He appointed his wife, two brothers and his solicitor, executors. He made a first codicil to his will not affecting the matters in question in this case. He obtained a commission in the Army at the beginning of the war and proceeded to France, where he was wounded and taken prisoner by the Germans. At the date of his will the testator had one child only, a son, Richard, who survived him, but died on July 15, 1918. A

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second son, Thomas, born during his captivity in Germany, also survived him.

On July 8, 1917, he wrote a letter from his prison camp to his wife in very affectionate terms, stating among other things that he had increased her allowance, and containing the following passage: "Also tell Mattingly this affects my will, which I now want added to it at once, that as Whitbread & Co., Ld., have given the shareholders more leaving powers I wish Dick and Tommy to have my ordinary shares equally divided between them; also that Bankside and grounds are to be in case of my death yours for life and then Tommy's plus Bankside farm, the remainder of my property to be Dick's, otherwise the will holds good. You will please show him what I have written." Mattingly was the testator's solicitor who had acted for him for many years, and had prepared his will.

The testator died in Germany on October 12, 1917, before any alteration could be made in his will.

On January 15, 1918, probate of the testator's will and codicil and of the letter of July 8, 1917, as a second codicil, was granted out of the Principal Registry to the wife and one brother, R. T. Godman, Mattingly having renounced probate, and power being reserved for the other brother to prove.

An originating summons was then taken out in the Chancery Division to determine the construction of the will and second codicil; but Peterson J. expressed a doubt whether the letter forming the second codicil had been properly admitted to probate, and directed that the summons should stand over generally with a view to having this question determined in the Probate Division.

This action was brought by the testator's brothers, who were appointed executors, against the widow and surviving son asking that probate should be revoked and the letter pronounced against.

Priestley K.C. and *C. L. Beddington* (*W. O. Willis* with them) for the plaintiffs. The letter was clearly not intended to be a will, it was merely an instruction to the testator's solicitor

who had prepared the will of August 12, 1915, to alter the old will. It was admitted to probate by mistake and the probate ought to be revoked. If the letter were pronounced for as a codicil it would apparently take away from the widow the annuity of 500*l.* a year given to her by the will, and that is quite inconsistent with the testator's intentions as shown by the whole letter.

Bayford K.C. and *Hon. S. O. Henn Collins* for the widow. It is not necessary to show that the testator thought he was making a will if the document clearly shows an intention to dispose of his property after his death. That proposition is true of ordinary testamentary documents. See Williams on Executors, 9th ed., vol. i., p. 95, and *Gattward* v. *Knee* (1); and the rule was specially applied to a soldier's will by your Lordship in *Dalrymple* v. *Campbell*. (2)

The widow is the legal personal representative of the son Thomas, and supports the letter as a codicil in his interest as well as her own. They also cited *In the Goods of English* (3); *In the Goods of Slinn* (4); and *Jekyll* v. *Jekyll*. (5)

Thorn Drury K.C. and *Grazebrook* for the infant son. There is nothing in the letter to show any testamentary intention, it is merely instructions to a solicitor to prepare a will: *Popple* v. *Cunison*. (6) But there is a further reason against admitting the letter as a codicil. The testator died before the Wills (Soldiers and Sailors) Act, 1918, came into operation. The letter, if it were a codicil, could only affect personal estate, but it purports to deal with real estate also, and in such a case the Court will not admit a document to probate unless the gifts of personal estate are wholly distinct from and unconnected with the dispositions of real estate: *Gillow and Orrell* v. *Bourne* (7) and *Tudor* v. *Tudor* (8) reported in a note to that case. Here the dispositions of real and personal estate are inextricably connected.

Priestley K.C. in reply. The rule in *Tudor* v. *Tudor* (8) only applies where it is clear that the testator would not have

(1) [1902] P. 99.
(2) [1919] P. 7.
(3) (1864) 3 Sw. & Tr. 586.
(4) (1890) 15 P. D. 156.
(5) (1753) 1 Lee, 419.
(6) (1822) 1 Add. 377.
(7) 4 Hagg. Ec. 192.
(8) 4 Hagg. Ec. 199, n.

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disposed of the personalty as he has done unless he had believed that his real estate was also disposed of. In this case the gifts are independent. He cited *Bartholomew and Brown* v. *Henley* (1); *Masterman* v. *Maberly* (2); and *In the Goods of Baxter*. (3)

HORRIDGE J.: This is an action asking for revocation of the probate of the second codicil to the will of the testator. The will was made on August 12, 1915, and for the purposes of this trial the two important things to notice in the will are that the testator gave an annuity and the possession of Little Ote Hall to his wife during her widowhood, and that he devised the residue of his estate equally between any children of his who attained the age of 21 years and survived him. He made a first codicil, which I think has nothing to do with the case. Between the making of that will and the writing of a letter, to which I shall refer in a few minutes, the testator acquired Bankside Farm and Drumdrills, and also the freehold dwelling house and garden known as Bankside. He further acquired the Manor Farm and adjoining lands and six cottages known as Manor Cottages. During the same period Whitbreads, in which company he held a number of ordinary shares, altered their Articles of Association thereby enabling any ordinary shareholder to leave the whole instead of only half of his shares to his family. On July 8, 1917, he wrote the letter in question. He died as a prisoner of the Germans on October 12, 1917. At the date of the letter he had two sons, one Richard and the other Thomas, but Richard died on July 15, 1918, and Thomas is the only child now surviving. [His Lordship then read the letter above set out.]

The first objection taken on behalf of the infant defendant is that this letter is not what is commonly called a soldier's will, because it is not testamentary in the sense that the testator intended to dispose of his property at the time by the letter. My view is that that document does not in itself purport to dispose of the property. I think it is

(1) (1820) 3 Phillim. 317, 318. (2) (1829) 2 Hagg. Ec. 235.
(3) [1903] P. 12.

instructions to be carried out by a further codicil to his will: and my reason is that it contains these words, "added to at once." If the testator had said, "Also tell Mr. Mattingly this affects my will which I now want added to," and no more, I should probably have held that that was an immediate disposition, but the words used are "at once," which I think means, "be quick in sending me the document which embodies these alterations." But the test applied by counsel for the infant defendant is not to my mind the true test. I think the true test is the one which I laid down in *Dalrymple* v. *Campbell*. (1) There I said: "In my view it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will, or had the power to make a will by word of mouth. The statement made by the deceased man must, I think, be meant for a will, only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death." I do not mean that he must know that by the document he has executed, or the language he has used, he is in effect causing a transfer of the property. I think the right test is whether he deliberately and intentionally expressed his wishes as to what should be done with his property on his death. It may be that he knows nothing about the fact that neither the Statute of Frauds nor the Wills Act have affected the right of a soldier "in expeditione" to make a will, but if he does in effect declare solemnly what his intentions are with regard to the disposition of his property, I think the law does the rest, and the declaration becomes a good soldier's will.

I am not going through the cases in detail, but I think that I am fortified in that view by the following authorities: *Bartholomew and Brown* v. *Henley* (2); *Masterman* v. *Maberly* (3); *In the Goods of Slinn* (4), and *In the Goods of Baxter*. (5) I have reconsidered my decision in *Dalrymple* v. *Campbell* (1), and I adhere to the view I then expressed. Therefore, this document, save for the matter which I am

(1) [1919] P. 7, 9.
(2) 3 Phillim. 317, 318.
(3) 2 Hagg. Ec. 247.
(4) 15 P. D. 156.
(5) [1903] P. 12.

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going to deal with, would have been such a document as I think ought to have been admitted to probate and was rightly admitted to probate in common form by the Registrar. There was a point raised before me, however, which was not raised before him. It was said that this letter was written before the Wills (Soldiers and Sailors) Act, 1918, came into operation. That Act extends the exception from previous statutes which applied to soldiers by enabling them to deal in a soldier's will with realty as well as personalty; but this testator died before that Act came into operation. Therefore this letter, good as I have held it to be as a soldier's will, could only operate as to personalty and could not operate as to realty. The contention before me under those circumstances was based on the authority of *Tudor* v. *Tudor* (1), which is reported only in a note to *Gillow and Orrell* v. *Bourne*. (2) The rules there laid down had regard to a will which was good as to personal estate, being made before the requirements as to the execution of wills of personal estate were enacted by the Wills Act, 1837, but bad as regards realty because it was not executed in the presence of three witnesses, and were expressed as follows: "For, where an unexecuted paper can only operate on the personal, and not on the real estate, if the disposition of the former arises from, and is dependent upon, and induced by, the disposition of the latter, the Court will not interpose to give even a partial operation to such a paper, for by so doing it would defeat the testator's intention. That was stated by Sir William Wynne in *Eyles* v. *Eyles* (3) to be the doctrine of these Courts. That learned judge stated in that case, 'There are many instances where a testator having intended to dispose of real and personal estate, the Court has given effect to the disposition as far as it can, and pronounced for the one part conveying the personalty, in other cases it has refused so to do.'" I pause there for a moment because the words both in the earlier portion and in the passage which I have last read deal with the personalty as a whole, and I think that that means it has got to be a will of personalty as a whole which

(1) 4 Hagg. Ec. 199, n. (2) 4 Hagg. Ec. 192.
(3) Unreported.

the Court can say is made entirely independently of the will of realty before the will of personalty as a whole can be admitted to probate. That is my view of the decision. I do not think that the Court can pick out one good personal bequest and admit the will to probate because it has that one bequest in it. I think it means that in order that the will may be admitted to probate as a will of personalty the Court must be satisfied that the will of personalty is independent of the will of realty. Then the learned judge, Sir William Wynne, goes on to say: "'The distinction is this, where the devise of the realty is perfectly independent of the disposition of the personalty, then, by giving effect to the unexecuted will, the deceased's intention pro tanto is carried into effect; but where one part appears to depend on the other, when a testator gives to A. because he has given to B., then it would defeat the intention, and be injustice to give effect to the one, unless you could to the other.'"

I do not think it is necessary to apply that high test to this case. I think there is no portion of this will which you can say is independent and in the mind of the testator unaffected by the devises of realty; and therefore, I think, even if the test is that the will can be admitted to probate if there is one good personal bequest in it, this document does not comply with those conditions.

I now propose to deal with the document: "Also tell Mattingly this affects my will which I now want added to at once, that as Whitbread & Co. have given the shareholders more leaving power I wish Dick and Tommy to have my ordinary shares equally divided between them." Now the effect of that was this, that under the will the half of the shares which he could then devise would fall into residue, and would go to either or both of these boys who attained the age of 21 years and survived their father, the letter dealing with them alters their destination entirely, because it at once gives a vested interest to Richard and Thomas in one half of these shares. Now the next portion is as follows: "Also that Bankside and grounds are to be in case of my death yours for life"—that means a life interest in this realty to the wife. In

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the previous will, he had only given a life interest in other realty during widowhood—" and then Tommy's plus Bankside Farm. The remainder of my property to be Dick's, otherwise the will holds good." Now it seems to me quite clear that the gift of the rest of his property must depend upon whether the devise of the Bankside properties was a good operative devise or not, and that, therefore, in considering how he should will and devise the residue which might, and in fact did, contain personalty, the amount of that residue would be materially affected by the question whether the Bankside properties were previously devised or not; and if that devise was bad, it seems to me it affects the whole gift of residue, and the considerations which might affect the testator in deciding how his residue should be left.

I think that is quite sufficient to prevent this letter being admitted to probate, because there was personalty included in the residuary gift, and it is so mixed up with the residue of realty that it is impossible to disentangle it; and as regards the residuary devise it is impossible to say that you could sever the whole of the personalty under the second codicil, as I treat it, from the realty. But I do not think it is necessary to go as far as that, because I think it is impossible to sever even the bequest of the shares. The bequest of the shares between the two children might have the most vital effect upon the final determination of the testator as to how his residue was to be distributed. If he had known that the residue was not going as he wished it to go, namely, the reversion of Bankside Farm to Thomas, and the rest of his property to Richard, he might very readily have said, " Well, I shall give the shares in Whitbreads in a different proportion." It seems to me that the whole of this second codicil is interdependent on each part of it, both as regards the bequest of the shares, the devise of Bankside Farm, and the bequest of the residue. Therefore I cannot give effect to the bequest of personalty, or even the bequest of Whitbreads' shares, on the ground that the devise of the realty is wholly independent of these bequests.

Under those circumstances I refuse probate of this letter,

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not on the ground that it is not a good codicil, which I think it is, but on the ground that it cannot operate upon realty, and that the realty and personalty are so indivisibly connected in the letter that it is impossible to give effect to the letter as regards the bequest of personalty or even as regards the bequest of the shares.

Therefore, the judgment in this case must be that the will and first codicil are pronounced for, and that the letter of July 8, 1917, is pronounced against, and all parties must have their costs as between solicitor and client out of the estate.

Solicitors for plaintiffs : *Thompson & Mattingly.*
Solicitors for widow : *Theodore Goddard & Co.*
Solicitor for infant defendant : *E. J. Stokes.*

J. R. B.

(IN PRIZE.)

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May 6.

THE HEIM.

[R. No. 12.]

Prize Court—Neutral Shipowners—Carriage of Enemy Property—Claim against Fund in Court—Freight and Expenses—Damages for Detention and Demurrage.

Neutral shipowners are entitled to freight, but not to damages for detention or demurrage, against funds in court representing the proceeds of enemy goods seized under the Reprisals Order in Council of March 11, 1915, and sold under an order of the Court.

CLAIM for freight, expenses, demurrage, and damages for detention.

The claimants, the owners of the Norwegian steamship *Heim*, by their claim as framed, claimed "in respect of chartered freight and demurrage, and remuneration for services rendered at the request of the Admiralty Marshal in placing the said steamship under his directions for the purpose of discharging at Bristol, and also for all costs, losses, damages,

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detention, and expenses arising out of the seizure and detention of the said ship and cargo by or at the instance of the Procurator-General or other proper officer of the Crown." The *Heim* was laden with a full cargo of tobacco, shipped at San Domingo for carriage to neutral consignees at Copenhagen. On arrival at Kirkwall the cargo was seized and ultimately sold as enemy property having an enemy destination, in accordance with the provisions of the Reprisals Order in Council of March 11, 1915, under a decree of the Prize Court dated April 14, 1916. In accordance with the decree the proceeds, which realized 26,380*l.*, were ordered to remain in court until the conclusion of peace or further order.

May 6. *Sir Robert Aske* (*Neilson K.C.* with him) for the claimants. The shipowners are entitled to recover the various sums claimed either against the Crown or against the fund in court. There can be no question as to their right to a sum in respect of freight based on the duration of the voyage as carried out : *The Stigstad.* (1) With regard to demurrage, expenses, etc., and interest thereon, the parties who have deceived the shipowners and the Crown—namely, the enemy owners of goods ostensibly destined to a neutral port—ought to bear the loss which they have caused : see *The Gorontalo* (2), where the Court allowed the expenses incurred in returning enemy cargo to this country, freight, landing and wharfage charges, port dues, and other expenses against the fund in court. [*The Bremen Flugge* (3) was also referred to.]

Trehern for the Procurator-General. The Crown's only concern in the matter is to protect the fund in court for the benefit of whom it may concern. Freight is in the discretion of the Court, but there is no authority for the allowance of demurrage or damages for detention as a charge against the goods. The fund in court should only be liable for those sums for which the cargo owners themselves would have been liable.

As framed the claim is against the Crown. The Crown is

(1) [1919] A. C. 279.

(2) (1916) Unreported. The material passage is set out in the judgment.

(3) (1801) 4 C. Rob. 90.

not liable for demurrage or damages for detention in respect of vessels declaimed under the Reprisals Order in Council (*The Stigstad* (1)), nor would the cargo owners have been liable. *The Gorontalo* (2) was expressly stated to be decided only on the facts of the particular case, and even in that case there was no claim for demurrage or for damages for detention. The loss caused to neutral shipowners by the detention of their vessels in the exercise of belligerent rights is a loss they have to put up with in time of war. See the observations of Sir Samuel Evans in *The Stigstad* (3) and *The Juno* (4); and demurrage incurred at the port of discharge is a loss which would fall on the charterer, not on the owners of the cargo. There is no right to interest, and it is not the practice to grant it.

The PRESIDENT (LORD STERNDALE): This case gives rise to the same difficulty that I felt in *The Rio de Janeiro* (5), a difficulty which also must have appeared in *The Gorontalo*. (2) It is that the shipowner is asking for a large sum to be paid out of the proceeds of the cargo owner's goods, or to be made a charge upon the cargo owner's goods, in the absence of the cargo owner, who has no opportunity of putting his case before the Court. The Crown, of course, was represented in this case, as in the others, and counsel for the Crown has put the case before me quite fairly and properly. It is true that he has not taken such an enthusiastic view in favour of the shipowner as the Crown took in the case of *The Gorontalo*. (2) But counsel for the Crown very properly points out to me that it is not a matter in which the Crown is directly interested. It is clear that no order can be made against the Crown for payment of any sum. Therefore there does exist the difficulty, as I have said, that I have to decide in his absence, whether in effect the cargo owner has to pay these sums.

The question arises in regard to a cargo of tobacco which was shipped on the s.s *Heim* from San Domingo to Copenhagen. The charter was in February, 1915, before the Reprisals Order

(1) [1919] A. C. 279.
(2) Unreported.
(3) [1916] P. 123.
(4) [1916] P. 169.
(5) Note, post, pp. 242, 243, 244.

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was promulgated. After the charter had been entered into, and after the Reprisals Order came into force, namely, in the beginning of April, 1915, the ship arrived at her loading port, and was loaded and left there on April 15. She was stopped about a month later by a British patrol vessel, and was taken to Kirkwall. She arrived there on May 15, remained until the 18th, and while she was there the cargo was seized by the Admiralty Marshal. Then the vessel was sent with a prize crew to Bristol—probably because Bristol is an important tobacco port. She arrived in Bristol on May 23, and began to discharge on May 26. On June 15 prize proceedings were instituted by the Procurator-General. Under the charter a lump sum of 6000*l.* was to be paid for freight—3000*l.* to be paid at once, and 3000*l.* on arrival of the ship at Copenhagen. As the ship never did arrive at Copenhagen, the second 3000*l.* has not become payable according to the terms of the charter. A considerable amount of expense was incurred for port dues, also for tug assistance, and so on, both at Kirkwall and at Bristol in the consumption of extra coal and extra wages, in addition to what would have been necessary if the vessel had gone straight to Copenhagen. The shipowners claim in respect of those additional expenses, and for the freight; and in addition a large claim is made, which is in the nature of damages, for the detention of the ship and loss of her use for the time it is said she was detained over and above the time which would have been occupied in the performance of the original voyage. All those sums are claimed against the proceeds of the cargo, or as a charge upon the cargo before it can be delivered under the order of the Court, as presumably it will be at some time after the end of the war, to the owners of it.

I think as to the freight and expenses the shipowner is entitled to some payment. I do not say that he is entitled to the sum of 3000*l.*; that may or may not be so. I think what is payable to him in respect of that must be taken on the basis which the Privy Council assumed to exist in *The Stigstad* (1), and apparently approved as being a right basis, namely, that he should be paid a sum which takes into account "the actual

(1) [1919] A. C. 279, 290.

course and duration of the voyage " and constitutes " a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service." And if there have been thrown upon the shipowner expenses, for instance, which would otherwise have been thrown upon the cargo owner, they must be paid by the cargo owner when he gets his cargo, because he is getting relieved of expenses which he would otherwise have had to pay. Any expenses which the shipowner has incurred, as it says in the passage I have read, " for carrying and discharging the cargo under the actual circumstances of that service " must be taken into account in arriving at the proper recompense for carrying and discharging it under those circumstances. To those I think he is clearly entitled.

But now comes the question whether he is entitled to claim damages for detention ? The claim in this case, as framed, is against the Crown ; I have no doubt about that. It was put in before *The Stigstad* (1) was decided, and the intention was to claim these sums against the Crown. If I were to hold the shipowner strictly to his claim, I should have to dismiss the whole claim on the ground that it is made against the Crown, and the Crown is not liable. But I do not think he ought to be defeated in that way. I think I ought to make any amendment that is necessary to raise the question of whether these claims are to be allowed against the goods. There is no case so far as I am aware in which a claim for damages for detention and demurrage has been allowed as a charge against the goods ; the question did not arise in *The Gorontalo.* (2) But it is said that the principle of that decision should lead me to allow these claims. It is true that at the end of the learned judge's judgment he expressed himself generally. He says : " If, notwithstanding the provisions of the Order in Council, of which ample public notice was given, attempts are made in this way to import goods into Germany, whether they are contraband or otherwise, any expenses necessarily and properly incurred by the Marshal of the Court, or by anybody else in respect of the matters

(1) [1919] A. C. 279. (2) Unreported.

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which must be done in order to carry out the Orders in Council, ought to be borne by the people who are attempting to evade its provisions. I therefore order that whatever sum is allowed by the Registrar to be the proper sum in respect of those expenses should be a charge upon the cargo and its proceeds." It was argued that those words must be interpreted more widely—that they mean that if attempts are made in this way to import goods into Germany, any claim by the shipowner for damages which he has sustained in consequence of the acts of the other belligerent must be borne by the goods. I cannot find that expressed in the words I have quoted; and also, although that statement is couched in very wide language, the learned Judge said just before: "I therefore want it to be clear that I decide the claim of Mr. Dawson Miller's clients [the neutral shipowners] upon the facts of this particular case." I do not think that case does oblige me to allow damages for this detention. Therefore it is left as a matter of discretion. In the absence of authority, I do not think I ought to allow these claims for damages. I did not put the position to the learned counsel in this case, but it was admitted before me in *The Rio de Janeiro* (1) that no action for damages in such cases would have lain against the cargo owner if he had now got his goods delivered to him, and that it is only the accident that there is a fund in court which would allow any such claim for damages to be made. If the goods had been destroyed by accidental fire, or something of that kind, no such claim could have been made. I do not think in these circumstances I ought to allow these claims for damages.

I therefore allow the claim for remuneration or recompense for the carriage of the goods on the principles which are laid down in *The Stigstad* (2), and I do not allow anything more than that. There will be no order as to costs.

Solicitors for the claimants: *Botterell & Roche.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

(1) Note, post, pp. 242, 243, 244. (2) [1919] A. C. 279.

NOTE. THE RIO DE JANEIRO. In this case which came before the Court on January 13, 1919, the owners of the Norwegian steamship *Rio de Janeiro*

claimed freight, expenses and "compensation for detention of the ship which was seized on June 14, 1915, and after discharging the seized cargo at Bristol, called at West Hartlepool, proceeded to Copenhagen and Christiania, completing the discharge of her cargo at the latter port on July 23, 31½ days at 150*l.* per day." The claimants gave credit for the time which would have been occupied in reaching Copenhagen and Christiania if the voyage had not been interrupted, and claimed 4,725*l.* in respect of the longer time occupied. It appeared that the vessel had on board a quantity of "greaves" cakes which had been condemned as contraband. There was also a quantity of wool, which had not been adjudicated upon, and a number of other parcels of goods which had been released. In addition there was a quantity of tobacco which had been ordered to be detained as enemy property under the Reprisals Order in Council, and it was against this consignment that the shipowners claimed a proportion of the expenses incurred, which they calculated as being one-eighth of the total sum.

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THE PRESIDENT (LORD STERNDALE) said that the claim came before him under curious circumstances. Subject to a question whether a claim for damages might be made against the Crown after the war, when they would have to account for the proceeds of the goods, it did not matter to the Crown whether the shipowner got his money or not. The only person to whom it mattered was the cargo owner, who was not present. That did not seem to have been considered an objection by the late President in *The Gorontalo*, but it raised a peculiar state of things. In *The Gorontalo* the Attorney-General, appearing for the Crown, rather supported the shipowner's claim so long as the Crown could get repayment from the cargo owners. But all that was done in the absence of the cargo owner, which was certainly not the ordinary way in which claims in these courts were dealt with.

[His Lordship continued:] This is a matter entirely for the discretion of the Court. It is not suggested that any claim could be made against the cargo owner personally. It is admitted that if, because his cargo was suspected, the ship had been diverted from her course and the cargo had then been released, no claim could have been made against him, because, as has been said, he had done no wrong. If his cargo were not released but had been ordered to be detained, as it has been, but for some reason or another the cargo had been destroyed without being covered by insurance, and there were no funds in court, it is admitted that no claim could be made against the cargo owner. Therefore there is nothing to support the claim in respect of which an action could be brought against the cargo owner at all, the only ground on which the case can be put, is that in the discretion of the Court this money ought to be ordered to be paid to the shipowner because it is just, right and fair that it should be.

A great deal of other cargo was unloaded at Avonmouth; some of it was contraband; more of it may yet be condemned as contraband, and if this tobacco had never been on board the ship at all, with the exception of the claim for expenses of discharging, all these expenses would have been incurred. They might have been incurred even if none of the cargo had been condemned; they might have been incurred because it was suspicious cargo that had to be discharged, and the shipowner would have been without remedy. I cannot see on general principles any reason why the Court should take that cargo which was discharged at Avonmouth and split it up, apportioning to each parcel of it a proportion of these extra

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expenses which were entirely incurred in consequence of the proper act of one of the belligerents. I should have had no hesitation about the matter but for the decision of the late President in *The Gorontalo*. In that case very similar expenses to these were allowed. They were not quite the same, because in that case the ship had not discharged the goods, and had been allowed to proceed by agreement with the Crown, and had taken the goods to Holland on an undertaking to bring them back or send them back again. The expenses claimed there were, at any rate, partly for bringing the goods back again, or for sending them back again. But still I think the principle of the expenses is the same, because in both cases the shipowner's argument is that he has had to incur extra expenses, and has lost the use of his ship for a certain time in consequence of cargo being on board which has been ordered to be detained and discharged, being enemy property, and that this cargo ought to pay for the extra expenses. In *The Gorontalo* the whole of the expenses were incurred in respect of that particular parcel of cargo. There was no mixing up of different parcels, each of which occasioned deviation and detention, as there is here, and it may be that this fact had some influence on the learned President's mind when he allowed them in that case.

[His Lordship read the passage from *The Gorontalo* quoted in *The Heim*, and said that he thought it was a decision of the special facts of the case, and did not lay down a general principle which obliged him to allow the expenses and damages. His Lordship continued as follows:] There remains the question of the expenses of discharge. This is claimed as a proportion of the Bristol agents' account, but that does not say that the amount exceeded what would have been payable by the shipowner if the cargo had been taken to its destination and discharged there, when it is taken into consideration that the whole bill of lading freight has been paid, although the whole bill of lading voyage has not been performed. It may be, apart from the question of detention, that the ship went as far, under the circumstances which actually existed, as she would have done if she had delivered her cargo. But she did not take the cargo where the cargo owner wanted it, and she has been paid her full freight as if she had done so, and there are not sufficient materials here for me to say that, in respect of the actual expenses of discharging, the shipowner has not been paid, in being paid his full bill of lading freight although he has not performed his full bill of lading voyage. Therefore I do not think this claim ought to be allowed.

E. C. T.

(In Prize.)

THE DÜSSELDORF.

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May 9, 12.

[1919, No. 1893.]

Prize Court—Capture in Neutral Territorial Waters—Extent of Three Mile Limit—Absence of Intention to violate Neutrality—Damages and Costs.

A German vessel was captured by one of His Majesty's ships at a spot just within three miles of two small pieces of land separated from the mainland of Norway by a narrow passage of water which dries at low tide. The Norwegian Government claimed the release of the vessel:—

Held, that the capture took place within the three mile limit of the Norwegian mainland and that the vessel must be released; but that, as the officers of the King's ship had merely miscalculated the distance and had no intention of violating territorial waters, the claimants were not entitled to damages or costs.

Action for the condemnation of an enemy merchant vessel and her cargo as prize of war.

The German steamship *Düsseldorf* was captured by H.M. armed naval vessel *Tay and Tyne* on February 28, 1918, off the coast of Norway. The Norwegian Government entered an appearance and filed a claim by which they claimed the release of the *Düsseldorf* and her cargo, together with damages and costs, on the ground that the capture took place within Norwegian territorial waters. The facts are fully stated in the judgment.

Sir Gordon Hewart A.-G., *Aspinall K.C.* and *Raeburn K.C.* for the Procurator-General.

Sir Erle Richards K.C. and *Balloch* for the claimants.

[The arguments largely centred round the question whether the three mile limit of territorial waters was to be taken from the mainland or from small uninhabited islands off the coast. As, in the result, the decision did not turn on this question, which was left undecided, the arguments are omitted.]

The President (Lord Sterndale): In this case the Crown is asking for condemnation of a German vessel, the *Düsseldorf*, and her cargo. A claim is put forward on behalf of the Norwegian Government, on the ground

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that the seizure of this vessel was made, at any rate partly, within the territorial waters of the Norwegian kingdom. By that they mean in this case within three miles of the Norwegian land, whatever that may be. The Norwegian Government has claimed that their territorial waters extend to a distance of four miles, but in this case they do not press that claim, and, without giving it up in any way in principle, they content themselves with asking for the release of the vessel and for damages and costs, because the seizure was made within three miles. The capture was effected by a British vessel, the *Tay and Tyne*, which was what is called a "Q" boat. She was to ordinary observation a merchant ship, but she was in fact an armed naval vessel. She was cruising off the coast of Norway on February 22, 1918, in command of Lieut. Mack, R.N.

[The learned judge dealt at length with the evidence as to the exact position of the capture, and said that he accepted the position marked on the chart by the lieutenant in charge of the King's ship. His Lordship continued as follows:] A three mile radius from that spot goes inside a group of islands called Buholmen, and it cuts two pieces of land—I do not call them islands, for reasons which will appear in a moment—called Sneisholmen and Rugholmen. They are pieces of land, one of 700 or 800 metres in length and the other of some 300 or 400 metres in length. At high tide they are islands, that is to say there is a very narrow passage of water between them and the mainland. At low water that passage is dry and there is nothing to separate them from the mainland. The question is from what place are the three miles from the coast to be reckoned. One contention on the part of the claimants was a very extreme contention—i.e., that wherever there is a rock, however small, however uninhabited, and however uninhabitable, within the three mile radius from the mainland, that must also be taken as being part of the territory of the country, and the three miles of territorial waters must be taken from that rock. So that if it happens to be two and three-quarters miles out there

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is really a distance of five and three-quarters miles from what is ordinarily called the mainland. All I say is—I give no opinion about that in this case, because it is not necessary—that I do not wish to be taken as accepting it as accurate. There was then a smaller contention—if I may call it so—and that was that at any rate an island such as the one I have mentioned of Buholmen, which is, I think, about 300 metres long, is large enough to be part of the mainland. That, again, I prefer to leave over for decision when it becomes necessary to decide it, but I cannot see my way to say that two pieces of land which are not disconnected from the mainland at low water, and not separated in any way, are not part of the mainland. If that be so, then, taking the position given by the Crown, this capture, or part of the operation of capture, at any rate, took place within three miles of the Norwegian coast so defined. As I have indicated, it is a very near thing indeed whether it was not within three miles of what is indisputably the mainland; it is a matter of a hundred yards or a couple of hundred yards. But, accepting the Crown's case to the full extent, in my opinion part of the operation, of this capture took place in Norwegian territorial waters and therefore there must be an order for the release of ship and cargo.

I wish to add this. There are two things which I think appear plainly in this case: one is that it is very difficult to judge in regard to a coast like the coast of Norway where the three mile limit does begin, and the other is that it seems to me quite clear that these British naval officers had no intention of violating Norwegian neutrality. In my opinion they had just got within territorial waters, but I think they had no intention of doing so, and that they meant to confine themselves to operations outside territorial waters, and only did not do so by some mistake.

Sir Erle Richards K.C. for the claimants on the question of costs and damages. The Norwegian Government not only have to protect their own territory against violations of neutrality, but as they may be responsible to belligerents whose ships

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have been seized within their territorial waters, it is necessary for them to protect themselves by asking for a decision on the question whether they are entitled to damages and costs. It is a matter for the discretion of the Court. In *The Anna* (1) Lord Stowell awarded damages where captures had taken place in American territorial waters.

[The PRESIDENT. I think it has been said that damages are not given unless neutral rights have been intentionally violated.]

Yes. In *The Twee Gebroeders* (2) Lord Stowell said: "I think the situation in which the vessels were stationed too dubious to affect the parties with any intentional violation of neutral rights. The capture may have arisen from misapprehension and mistake," and he refused costs and damages. In the present case the trouble arose because the British officers mistook what really is part of the mainland for an island. They were wrong, and if they chose to hover about Norwegian territorial waters without precise information as to where the three-mile limit begins, the penalty of damages and costs should follow a violation of those waters.

[Counsel for the Crown were not called on.]

THE PRESIDENT (LORD STERNDALE). I do not think there is any ground for damages in this case. If these British ships had been sent with wrong instructions according to international law, it would be another matter; but Lieut. Mack thought that he had to take the three mile limit from the mainland and not from an island. I do not know how he formed the impression that Rugholmen was an island, because I doubt if he had ever seen it before. What happened was, I think, that he was bona fide attempting to respect the neutrality of Norwegian waters, and that he unfortunately made a miscalculation as to his distance, and I do not think that is sufficient ground, according to the cases, for an order for damages and costs.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the claimants: *Waltons & Co.*

(1) (1805) 5 C. Rob. 373. (2) (1800) 3 C. Rob. 162, 166.

E. C. T.

(In Prize.)

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Feb. 26, 27 ;
March 3, 4,
5, 6, 7 ;
May 27.

THE PARANA.

[1916, No. 959.]

Prize Court—Doctrine of Infection—Passing of Property—Neutral Shippers and Consignees.

If a neutral shipper is the owner of goods on board a ship which are confiscable as contraband, and, on the same ship there are other "innocent" goods which he has contracted to sell to neutral consignees, the question whether the shipper is to be regarded as the owner of the "innocent" goods must be decided by prize law; and if the result is that the shipper is to be regarded as owner, although according to municipal law the property in the goods would have passed to the consignees before the date of seizure as prize, the "innocent" goods are also subject to condemnation.

Actions for the condemnation of consignments of coffee as prize.

In this group of cases the Crown sought the condemnation of large quantities of coffee shipped on eight different vessels, of which the *Parana* was one, by Eugen Urban & Co., of Santos and Rio, to various Swedish consignees. Eugen Urban was a German by birth who had resided in Brazil for thirty years. He founded the Rio business in 1901 and the Santos business in 1910. In 1912 the firm of Eugen Urban in Hamburg was founded to act exclusively as general agents for the two Brazilian houses. The partners were Eugen Urban and one Ventz, the latter being in no way interested in the Brazilian concerns.

The Crown claimed the condemnation of all the consignments in this group on the ground that according to prize law the property in them remained in Urban & Co., and that they were infected by the presence on the same vessels of other consignments of Urban & Co. which had been condemned as contraband having an enemy destination by a judgment of the Prize Court delivered on December 5, 1918.

Claims were put in by the various Swedish consignees, and it was contended on their behalf that according to municipal

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law the property in all the consignments had passed to them before the date of seizure; that they had the control of the destination of the goods and had given them an innocent neutral destination; that the doctrine of prize law as to the passing of enemy property was not applicable to the case of a neutral shipper; and accordingly that the doctrine of infection did not apply.

Sir Gordon Hewart A.-G., Sir Ernest Pollock S.-G. and *Stuart Bevan K.C.* for the Procurator-General.

R. A. Wright K.C. and *Sir Robert Aske* for Lundgren & Rollven.

Le Quesne for Carl Hahn & Co.

Sir Robert Aske for I. O. Holmer & Co.

Cur. adv. vult.

May 27. THE PRESIDENT (LORD STERNDALE), after dealing with the evidence as regards the constitution of the firm of Eugen Urban & Co. of Santos and Rio and its relations with the Hamburg house of the same name, which he said led him to the conclusion that for the purpose of the Santos and Rio business the firm must be regarded as a neutral and not as an enemy firm, continued as follows:

The Crown in respect of all the parcels contained in this group asked for condemnation on the ground that they were infected by other goods belonging to the same shippers which had been condemned as contraband. They put in what was called an "infection schedule" showing the goods previously condemned, which included shipments on the *Parana*. All of these were shipped by Urban & Co., and in all the cases the property remained in Urban & Co. at the time of sailing. If, therefore, there were upon the same ship on the same voyage other goods the property in which remained in the shippers, those goods would, according to my judgment in *The Antwerpen* (1), following *The Kronprinsessan Margareta* (2) and *The Posteiro* (3), be infected by the goods already con-

(1) See note, pp. 252, 253, 254, post. (2) [1917] P. 114.
(3) (1917) 3 Br. & Col. P. C. 275, 286.

demned. I propose therefore to inquire whether at the time of sailing or before seizure the property had passed from Urban & Co. to the consignees. [His Lordship dealt with a number of consignments on various vessels and continued:] On the *Parana* there were several shipments, two to Lundgren & Rollven, claimed by them, and three to Johan Broms, one of which is claimed by J. O. Holmer & Co., and the others by Carl Hahn & Co. All the shipments were by Urban & Co. in the name of Nordskog. The contract with Lundgren & Rollven was c.f. Gothenburg, reimbursement at sight on Malareprovinsernas Bank, Stockholm. A confirmed credit was opened, and on October 27, 1915, Nordskog & Co. advised Malareprovinsernas Bank of their drafts on them in favour of the Brasilianische Bank fur Deutschland in payment of the coffee shipped from Santos. On November 9 they advised the same bank of their draft "in favour of themselves in payment of coffee from Rio." The letter of October 27 is as follows: "Dear Sirs,—We herewith beg to advise you of our draft on you at sight for the following amount—N 622 Marks 59.514, under date of to-day to the order of the Brasilianische Bank für Deutschland, being invoice cost of 1000 bags of coffee shipped by str. *Parana* to Goteborg for account and risk of Messrs. Lundgren & Rollven, Ornskoldsvik, B/L and copy of invoice accompanying our draft." The letter of November 9 is to the same effect, only the draft is in their own favour. I do not think it is clear whether the drafts and documents were enclosed in these letters or whether they were merely advices, in which case the drafts and documents would be sent forward by the banks in whose favour the drafts were drawn, but I do not think it is material. In the case of the Santos coffee payment was made on December 8, 1915, and in the case of the Rio coffee on December 31, 1915. One payment was therefore made before and one after the seizure, and the property, according to municipal law, passed accordingly.

The two remaining shipments were by Nordskog for Urban to Johan Broms, who resold to the claimants one lot of 500 bags from Rio and two lots of 500 from Santos. In the case

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of the 1000 bags shipped from Santos payment was made and the documents taken up on December 6, 1915, and in the case of the 500 from Rio on December 27, 1915. As I have found the date of seizure of these goods on the *Parana* to be December 18, 1915, the property at the time of seizure would by municipal law have passed to the purchasers in respect to the Santos, but not to the Rio coffee.

In *The Posteiro* (1) the late President, in giving judgment, used these words: "The question of the ownership of goods carried by sea in time of war between maritime nations must be determined in accordance with the doctrines of prize law, and not of municipal law. I have dealt with this subject with some fulness in earlier cases, for example, *The Kronprinsessan Margareta and The Thai.* (2) In my view the same rules for determining ownership must be adopted when the doctrine of contagion or infection is invoked. So that, if A., a neutral, has goods on board a ship, which are confiscable as contraband; and if on board the same ship goods contracted to be sold by A. to B. are being carried which would be—so called—'innocent' goods, and not confiscable, the question whether A. or B. is the owner of them must be decided according to prize law; and if the result is that A. is regarded as the owner the 'innocent' goods suffer the same penalty as the contraband." I do not know whether that particular question arose with regard to any goods in that case, but the learned President was distinctly laying down principles for the guidance of the proceedings of the Court, and I consider that I ought to follow them. The result is that infected parcels are on the same footing as those in which the property had not passed by municipal law, and all the goods in this group must be condemned as good and lawful prize, with costs.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *Botterell & Roche.*

(1) [1917] 3 Br. & Col. P.C. 275, 286. (2) [1917] P. 114, 122.

NOTE.—THE ANTWERPEN. In this group of cases the Crown claimed the condemnation of a number of consignments of coffee on the *Antwerpen* and several other vessels, all shipped by or on behalf of Diebold & Co., of Santos.

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The sole member of the firm was Alexander Diebold, a German, who soon after the outbreak of war left Santos and made his way to Germany, where he joined the German army. In some of the cases the Crown sought condemnation on the ground that the goods were intended for Germany on a continuous voyage, and in others, although it was admitted that there was no contraband destination, it was argued that the goods should be condemned by reason of the doctrine of infection.

1919. May 22. THE PRESIDENT (LORD STERNDALE), in giving judgment, said that he could not think that a man having a business and commercial domicil in a neutral country, who returned to Germany and engaged in active hostilities against this country, leaving his business under the care of a manager but controlling it himself from Germany so far as he was able, could be considered anything but an enemy. He thought therefore that Diebold & Co. were an enemy firm and their property enemy property.

[His Lordship then dealt with the respective consignments, some of which he held had an enemy destination and accordingly condemned. As to four of the cases, however, he held that no enemy destination was shown. As to these his Lordship said that according to municipal law the property in one of them had passed to the consignee before seizure. In the others the property was still in Diebold & Co. His Lordship continued as follows:] In all cases, however, the sellers had parted with the control of the goods before seizure except so far as was necessary to secure payment. If the contract were carried out and payment made, the destination of the goods after arrival in Scandinavia depended upon the volition of the purchaser and not of the shipper. The first question I have to determine is whether in cases where by municipal law the property had passed to the purchasers it must by reason of the goods being enemy property be held to be still in Diebold & Co., the shippers, according to prize law. It was argued for the claimants that the doctrine of prize law as to the passing of enemy property is only applicable to cases where condemnation is asked against goods by reason solely of their being enemy property, and is not applicable where the passing of the enemy property is only one element in the case for condemnation. It is enough for me to say that this contention is contrary to many decisions in this court, of which *The Kronprinsessan Margareta* (1) and *The Posteiro* (2) are only examples, and that it is not open to me to consider it. In all these cases, therefore, for the purposes of prize law, the property was in Diebold & Co. at the time of seizure, and it is contended by the Crown that in these circumstances the doctrine of infection requires their condemnation. I think it is clear that this application of the doctrine goes far beyond anything contemplated by those who established it in totally different circumstances. The doctrine was established in the simple circumstances of a shipper who had two parcels of goods over the destination of both of which he had control in the same ship. In the circumstances of the present case, as I have pointed out, the seller has retained no control over the destination of the goods, and the contraband destination of the two infecting parcels is given, not by the shippers, but by the respective consignees. All the other consignees have control over the destination of their parcels and have given them an innocent and neutral destination; they have paid for the goods and, in case of condemnation, the loss, whether it be called punishment or not, will fall entirely

(1) [1917] P. 114. (2) 3 Br. & Col. P. C. 275, 286.

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upon them and the shipper will lose nothing at all. That such a result should be produced by the fact that, although the goods had been sold and the seller had parted with control over them except for the purpose of payment, the property had not technically passed from him, is, as I have said, a result not contemplated by those who established the doctrine. It is another instance of the difficulty which constantly arises in prize cases of applying principles established in one set of circumstances to another set entirely different. It was, therefore, argued before me by the claimants that the doctrine was not applicable, substantially on the grounds I have indicated above. There appeared to me to be considerable force in these arguments, and if it were open to me to consider them I should wish to do so with great care. I think, however, it is not open to me. In my opinion I ought to follow the decisions of my predecessor, and I find that this question was considered and decided by him in at least two cases. It is decided in *The Kronprinsessan Margareta.* (1) [His Lordship quoted the passage given ante, p. 252.] That seems to me to be a decision that the property does not pass in contraband goods afloat and that the same principle is applied to them as to enemy goods. Then the late learned President points out that in that case it might not be necessary to resort to that doctrine because the property had not passed according to municipal law. If, however, there were any doubt as to the extent of that decision, it is, I think, entirely removed by the late President's decision in *The Posteiro.* (2) [His Lordship quoted the passage set out above.] I think I am bound to follow these decisions, and I do not wish to express any agreement or disagreement with them. I think the whole question of infection as applied to the conditions of modern commerce is one which may well be considered in a Court of Appeal. I therefore condemn these five consignments as good and lawful prize.

(1) [1917] P. 114. (2) 3 Br. & Col. P. C. 275, 286.

E. C. T.

(In Prize.)

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May 28, 29, 30.

THE NOORDAM (No. 2) and Other Ships.

[1916, R. No. 72.]

Prize Court—Seizures from the Letter Mail—Securities—Goods of "enemy origin"—"Enemy property"—Reprisals Order in Council of March 11, 1915—*XIth Hague Convention, art.* 1.

Goods which have been bought bona fide from their German owners by a Dutch purchaser either in Germany or in Holland, and are at once forwarded by him from Holland to America, are not liable to seizure under the Reprisals Order in Council of March 11, 1915, as they have ceased to be "enemy property" or goods of "enemy origin," and the doctrine of continuous transit does not apply to them.

Assuming that bonds, coupons, and other securities sent by letter mail are "correspondence," their seizure ex neutral vessels under the Reprisals Order, as enemy property or goods of enemy origin, is not invalid by reason of the XIth Hague Convention, which provides that "the postal correspondence of neutrals or belligerents . . . . which may be found on board a neutral or enemy ship at sea is inviolable." A Convention of that kind cannot deprive a belligerent of the right of reprisal; and, if a Reprisal Order is not attended with unreasonable inconvenience and loss to neutrals, it is not invalid by reason of the fact that it is contrary to the provisions of the Convention.

Actions for the detention of securities seized ex the letter mail of neutral vessels under the Reprisals Order in Council of March 11, 1915, as enemy property and/or goods of enemy origin.

The *Noordam*, and three other Dutch vessels, the *Rotterdam*, *Zaandijk* and *Gelria*, sailed from Dutch ports bound to New York after the date of the Reprisals Order, and thereunder were diverted to British ports. Their mail bags were examined, and a quantity of bonds, coupons and other securities were seized. A number of these consisted of Japanese bonds issued in Berlin. Various claims were entered on behalf of neutral persons and firms who alleged that they had bought the securities, and it was contended on their behalf that the securities were not enemy property or goods of enemy origin within the meaning of the Reprisals Order; and further, that they were inviolable under the XIth Hague Con-

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vention. The facts of the respective cases and the material articles of the Reprisals Order and of the Hague Convention are set out in the judgment.

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Geoffrey Lawrence* for the Procurator-General.

Sir Erle Richards K.C. and *Darby* for Wiegman's Bank and others.

Theobald Mathew for the American Express Co.

Darby, *A. W. Grant* and *Sir Robert Aske* respectively for various other claimants.

The PRESIDENT (LORD STERNDALE). The Crown in these cases asks for an order of detention in respect of a number of securities which were seized from the letter mail while on their way to New York. The ground upon which the order of detention is asked is that the securities were either enemy property or of enemy origin, and that, therefore, they came within the Reprisals Order of March 11, 1915, art. 4: "Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or Allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court."

The first question that arises is, are these securities goods? They consist almost entirely of bonds and coupons, though there are a few shares amongst them. The decision of the late learned President in *The Frederik VIII.* (1) seems to me to determine that they are. If, therefore, they are of enemy origin or enemy property an order of detention ought to be made with regard to them. It seems to me that what I have to look to is whether these goods, at the time they were seized, were in the course of transit from an enemy country, or whether they were otherwise enemy property. The first

(1) [1917] P. 43.

point that was argued before me was: that these securities were still in transit from Germany, although they might have been delivered to somebody in Holland, and by that person sent on upon the transit in the course of which they were seized—in other words, that the transit was one transit from Germany, as was held in *The United States*. (1) I think that is quite correct with regard to securities which were sent from Germany for sale in America on account of the persons who sent them from Germany, and I also think that it does not matter that on the way they had been put into the hands of an intermediary who was acting for the German owners, who sent them in order that they might be forwarded on to America. There are cases of that kind, and according to the decision in *The United States* (1), where a person in Germany has sold goods or securities—any sort of goods—to a person in America, and that person in America has paid for them before they started upon their transit, if the transit from Germany across Holland, and from thence across the Atlantic is made on the impulse, if I may call it so, of the German seller, it is all one transit, and it does not matter that part of it has to be made in Germany or through a neutral country like Holland. That is the decision in *The United States*. (1) It goes a long way, but I have no wish to question it. It is a decision which binds me, and if the facts come within that principle, then, of course, there must be an order of detention.

But I do not think that principle applies if there is a sale by somebody in Germany, or a sale in Holland, of property which is German, and delivery of the things themselves to a Dutch purchaser, who sends the securities or goods for his own purposes to America, although he may do it the day after, or on the very day, on which he has bought them. If there be really a bona fide sale and delivery in that way, in my opinion, there is no continuous transit from the seller to the purchaser in America. The seller has sold to somebody in Holland and has delivered the things to the buyer in Holland, and from that moment the seller has no control

(1) [1917] P. 30.

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over them whatever. I do not think it matters that he may have sold to a person in Holland because he thinks or wishes that that person in Holland is going to send them to America. There is no continuous transit in that case. The transit continues until the goods get to the buyer's hands, and when they get to the buyer's hands, so far as the seller is concerned, the transit is over. That seems to be laid down in a number of cases, and particularly, and perhaps most clearly, in *The Baltica*. (1) If, therefore, in these cases the claimants satisfy me that they really bought these securities from people either in Germany or on the Dutch Stock Exchange, and received delivery of them, then I think that no order of detention ought to be made, because I do not think that they are enemy property. I will deal with the question of enemy origin directly. So far as enemy property is concerned, I think they would not be enemy property, and that the doctrine of continuous voyage or continuous transit would not apply to them. I will now go through the individual cases.

The first case is a claim by Wiegman's Bank, Amsterdam, to 968*l.* 19*s.* Japanese coupons sent to the Irving National Bank, New York. There is an affidavit by Mr. Wiegman. He is a gentleman whose bank is said to have been very well affected to Germany, and to have done what it could for Germany. I will assume that to be the case. He says that his bank bought the coupons from January 3 to 7, 1916. He exhibits what he calls the bordereau which was forwarded to the Irving National Bank, satisfying the different credits which were sent. Then in a subsequent affidavit he gives particulars as to the persons from whom he bought the coupons, and the dates on which he bought them. Most of them were bought in Germany, four were bought in Holland. He exhibits to that affidavit documents showing payments for the securities, and he swears that they were delivered to him, and that he then sent them on to New York. I can see no reason for saying that the whole story is untrue and that those documents are fabricated. If the coupons were bought honestly and bona fide, and if he were acting as the purchaser in his own

(1) (1857) 11 Moo. P. C. 141.

interest, forwarding them to America after they had been delivered to him in Holland, in my opinion, they would not be enemy property, and the doctrine of *The United States* (1) would not apply, because there was no continuous transit and they were not in transit at the time from the enemy. I think no order as to enemy property ought to be made in respect of that item.

The next one is a different kind of transaction. The securities, consisting of Japanese and American railway bonds and notes to the amount of 3077*l.*, are claimed by the American Express Co., of Broadway, New York. It appears from the evidence filed on their behalf that the American Express Co. in Berlin, a German registered company, bought these securities and sent them to the American Express Co. in New York. The American Express Co. of Berlin must be considered an enemy company, and, as the property was in them when it started, it must continue in them until the security reaches New York and gets into the hands of somebody else. Counsel for the American Express Co. argued that although it was technically a German registered company it was entirely American; that is to say, 99 per cent. of its capital was held by Americans and 1 per cent. by British shareholders, and according to *Daimler Co.* v. *Continental Tyre and Rubber Co.* (2) the Court should look behind the legal entity of the registered company, and discover who are the persons really interested. That case held that, for one purpose at any rate—and perhaps for some others—the Court must look behind the legal entity, and determine who are the real controlling persons. How it is to be ascertained who the real controlling persons are, and whether they are composed of a bare majority or a two-thirds majority or whatever it may be, is not specified. But it is not necessary to look into that, because the judgment of Lord Parker expressly excepted from the operation of that principle the question of property. As this is a question of property it is obvious that that decision does not apply to this case at all. But what seems to me to be the true conclusion on the

(1) [1917] P. 30. (2) [1916] 2 A. C. 307, 336.

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facts is that these bonds never were the property of the Berlin company at all. They were bought by the Berlin company for the American company, and the American company of New York were debited by the Berlin company with the purchase price. If the Berlin company had bought the securities for themselves, and had sent them to be sold on their own behalf, the debit would not have arisen until the securities had been sold and the money had reached the hands of the American company, who would have had to account for it to the Berlin company. Therefore it seems to me that being bought on account of the American company and delivered to the agents of the American company in Holland and by them sent to America, there was no continuous transit. They were delivered to the agents of the purchaser in Berlin (I do not attach much importance to that); they were sent into Holland and received in Holland by another agent of the purchaser, and by him sent to the purchaser in New York. It does not seem to me that on these facts the case is brought within the principle that I am asked to apply.

[The learned President then dealt with a number of other items, claimed and unclaimed. As to some of the claimed items his Lordship said that the claimants had not discharged the onus upon them of proving that they had bona fide bought the securities before they were despatched from Holland to America, and that in these cases there must be an order for the detention of the securities as enemy property. His Lordship continued:] I have only dealt with the cases so far upon the basis of enemy property, but I have also to deal with the question of enemy origin. If they be of enemy origin they are liable to be detained just as much as if they were enemy property. I have no intention of defining the phrase "enemy origin." There is a good deal to be said for the view taken by the late learned President that "enemy origin" and "enemy destination" are terms which must be read together in the Reprisals Order, and that enemy destination has reference to goods going into enemy countries, while enemy origin refers to goods coming out of the enemy

countries. But I am not going to decide that that is necessarily the meaning of those phrases at all. There is another argument which has been addressed to me by Sir Erle Richards depending not only upon the meaning of the word "origin" in this Reprisals Order, but upon the meaning of the word "originating" appearing in a subsequent Order—namely, that it indicates something which one may say in ordinary language originates in the country, and that everything that comes out of the country has not necessarily its origin in that country. That again I have no intention of deciding. I think that point arose for discussion in *The Leonora* (1) before the Privy Council, in which judgment has not yet been delivered. I do not think that it is necessary to give any general decision upon the proper definition to apply to the phrase "enemy origin" under these circumstances, but I think that whatever definition be applied to it does not apply to this case—that is to say, to those bonds as to which I have found that there has been a bona fide sale and delivery before shipment. The transit from the enemy country is, in my opinion, at an end when the goods are delivered to the neutral purchaser in a neutral country; and, if that be so, these securities did not come from the enemy at all, but from a neutral country. None of them are German bonds; they are Japanese bonds, and American railway bonds; while the coupons are coupons in relation to Japanese loans and various securities. None of them had their origin, in the other sense, in Germany at all. They are foreign securities which are dealt with in Germany. Therefore, whichever meaning be applied to the word "origin," it seems to me that these securities do not come within it, and are not of enemy origin. There may be other meanings which have not been suggested, but I cannot think of any meaning of the term "enemy origin" which would bring these securities within it if I am right in my finding that the transit from the enemy country was at an end when they were delivered in the neutral country.

It is necessary to mention one further argument which was

(1) [1918] P. 182, see now [1919] A. C. 974.

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raised, because I think, if it be a sound argument, the result of it would be to make the Reprisals Order bad. It was contended that by reason of art. 1 of the XIth Hague Convention, dealing with correspondence—which it is said include these bonds, and securities and coupons—that these goods cannot be seized. The article is as follows: "The postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea is inviolable. If the ship is detained the correspondence is forwarded by the captor with the least possible delay. The provisions of the preceding paragraph do not apply in case of violation of blockade to correspondence destined for, or proceeding from, the blockaded port." I am not at all satisfied, to begin with, that bonds and securities are correspondence. In some cases the securities were enclosed in an envelope with a letter. In others the evidence shows that they were made up into parcels, and when made up in that way, if they had been sent by parcels post, they would be admittedly outside the Convention. But it is argued that because people choose to pay the letter postal rate instead of the parcels post rate, that what is sent in that way becomes inviolable. I cannot think that it depends on whether the contents go by the letter mail or by the parcel mail. I put some instances that have happened during this war of articles such as rubber, and the Solicitor-General stated some others, such as aluminium, and all kinds of things which have been sent by letter mail. (1) The answer to that was that these things are not generally sent by letter post, and that correspondence must mean letters and everything ordinarily sent by letter post. I am not at all satisfied that that is right, and I do not know how the Convention could be worked if that method were adopted, because in every case there would have to be an inquiry into what the habits of people were which induced them to put into letters such articles—

(1) The Intercepted Letters branch of the Postal Censor's department made a large collection of contraband merchandise and samples, of which a certain number may in due time be placed in the British Museum and the Imperial War Museum.—F. P.

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which I think it would be impossible to do. I am not satisfied that that is the right view to take of what the Convention was intended to cover; but if it be the right view it seems to me to follow from the decisions of the Privy Council in *The Stigstad* (1) and other cases, that a Convention of this kind cannot deprive one belligerent of the right of reprisal against another, especially if that other belligerent is breaking every possible canon of international law; and that the belligerent may take measures against his adversary which are not justified by the Convention, just as he may take measures against him which are not justified by the ordinary canons of international law. The question is whether in doing that he is engaging in something which is attended with unreasonable inconvenience and detriment to neutrals. In my opinion no case is shown here that what was being done in regard to these securities would have been attended with an unreasonable amount of inconvenience or detriment to neutrals, and I do not think that there is anything in any Convention which makes this Reprisals Order invalid. Therefore, my judgment on the individual cases must be that which I have stated it to be.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the claimants: *Waltons & Co.; Parker, Garrett & Co.; Botterell & Roche; Travers Smith, Braithwaite & Co.*

(1) [1919] A. C. 279.

E. C. T.

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March 28 ;
June 5.

[BEFORE THE NAVAL PRIZE TRIBUNAL.]

(In Prize.)

THE DERFFLINGER AND OTHER SHIPS.

THE FÖRDE.

THE LEDA.

In the Matter of THE AMERICAN MEAT PACKERS' AGREEMENT.

In the Matter of CERTAIN SWEDISH COPPER.

Prize—Prize Droits—Droits of the Crown—Naval Prize Fund—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30)—*Proclamation of August* 15, 1918.

A number of German and Austrian vessels, which were either in Egyptian ports at the outbreak of war or came in shortly afterwards, declined to leave port and remained there until, under compulsion of the Egyptian authorities, British crews were received on board to navigate them outside territorial waters where they were formally captured by British commissioned ships of war. All the vessels were subsequently brought before H. B. M. Prize Court for Egypt, and, on appeal to the Privy Council, and were condemned as prize:—

Held, by the Tribunal (Lord Phillimore, Admiral of the Fleet Sir George Callaghan, and Sir Guy Fleetwood-Wilson), that the captures must be treated as having been made at sea, and not when possession was taken of the vessels while still in Egyptian ports, and, accordingly, that the proceeds were droits of the Crown and not droits of Admiralty, and passed into the Naval Prize Fund (*The Derfflinger*).

The proceeds of condemned cargoes ex neutral vessels which came into the Downs for examination, owing to the system of patrols established whereby vessels passing through the Straits of Dover were compelled to go into the Downs, are droits of the Crown (*The Förde*).

A German vessel, captured at sea by one of His Majesty's ships and condemned as prize, was afterwards released by the Crown as an act of grace, as it appeared that, although nominally owned by a German company, the real owners of the vessel were an American company.

Held, by the majority of the Tribunal (Sir Guy Fleetwood-Wilson dissenting), that it was immaterial that the release took place before the passing of the Naval Prize Act, 1918, under which it was clear that such a prize, being a droit of the Crown, enured for the benefit of the fleet, and that the value of the vessel, with interest at 5 per cent., should be paid by the Exchequer into the Naval Prize Fund (*The Leda*).

Large quantities of meat consigned by the big American meat packers of Chicago, ostensibly to neutral consignees, were seized as prize. For reasons of State the Crown came to an agreement with the packers

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THE AMERICAN MEAT PACKERS' AGREEMENT, *In the matter of.*

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whereby a formal decree of condemnation by the Prize Court was made, subject to the terms that 75 per cent. of the condemned proceeds should be paid out to the packers.

Held, that the Exchequer was not bound to bring the value of the released 75 per cent. into the Prize Court for adjudication by the Tribunal (*In the Matter of the American Meat Packers' Agreement*).

Parcels of copper, consigned to Swedish ports and seized as prize, were not brought before the Prize Court for adjudication, but a certain sum was paid to the Swedish claimants and part of the copper was taken over by the War Office and the Ministry of Munitions and part was sold, a profit of 18,741*l.* being made on the transaction. By para. 5 of Sched. I. to the Naval Prize Act, 1918, there shall be paid into the Naval Prize Fund "any other sums received in respect of ships and goods subject to prize jurisdiction which the Tribunal consider may reasonably be treated. . . . as being sums to which, had there been a grant of prize to captors, captors would have been entitled."

Held, that the Exchequer was not liable to pay the profit realized over the transaction into the Naval Prize Fund (*In the Matter of certain Swedish Copper*).

FURTHER CASES decided by the Naval Prize Tribunal to determine what sums should be paid into the Naval Prize Fund in accordance with the Proclamation of August 15, 1918, whereby His Majesty declared his intention of granting prize money to his Naval and Marine Forces out of the proceeds of such prizes captured during the war as the tribunal should declare to be droits of the Crown. (1)

The facts of each case are summarised in the headnote and are fully set out in the judgments.

Sir Gordon Hewart A.-G. (*Pearce Higgins* with him) for the Exchequer. As regards the Egyptian cases the Prize Court in Egypt took the view that the captures were made in port: see Judge Cator's observations in *The Gutenfels* (2), the preliminary case in which the status of the Egyptian ports was argued, and on appeal the Privy Council did not dissent from the view. (3) It is submitted therefore that the "hand of violence," which is the test in these cases (see *The Maria Francoise* (4)), was laid on all these vessels in port.

[LORD PHILLIMORE. Then why were they sent out?]

It may be conjectured that the reason was that there was

(1) A number of typical cases were decided by the Tribunal in *The Abonema* and other ships, reported ante, p. 41.

(2) (1915) 1 Br. & Col. P. C. 102, 107.

(3) [1916] 2 A. C. 112.

(4) (1806) 6 C. Rob. 282, 297.

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some doubt as to the political status of Egypt at the time, and also the authorities in Egypt may have been desirous that no question should arise as to any infringement of the Suez Canal Conventions. The so-called captures at sea should be disregarded, and the tribunal should look at the previous acts which had taken place and hold that the real seizures took place in port, when it would follow, the vessels having come in voluntarily, that the proceeds of sale constitute droits of Admiralty and belong to the Exchequer and not to the Naval Prize Fund.

As regards the *Förde* and other ships which were examined in the Downs, the British naval patrols instructed all neutral vessels going east or west through the Straits of Dover to proceed to the Downs, and it was practically impossible to escape. It is therefore difficult, on behalf of the Exchequer, to contend that these vessels came in for examination from any motive other than that arising out of the occurrence of war.

With regard to the American meat packers' cases and the Swedish copper cases, no decree of condemnation was made at all in the latter, and in the former there was merely a formal decree as part of the agreement whereby 75% of the proceeds was released. There is an unbroken line of authorities that the Crown is entitled to release prizes before condemnation without the consent of the captors: *The Elsebe* (1); *The Neptune.* (2) After condemnation, as in the case of the *Leda*, the Crown was entitled to release at any time up to the date of the Proclamation by which the Crown declared its intention of granting prize money. All property seized as prize belongs to the State unless and until granted away: see *The Melomane* (3) and Story's Principles and Practice of Prize Courts (Pratt's Ed.), p. 115. The Naval Prize Act, 1918, and the Proclamation made thereunder, are not retrospective, and the grant of prize money is only payable out of the net proceeds still in the custody of the Crown.

Sir Reginald Acland K.C. (*Captain Maxwell Anderson R.N.*

(1) (1804) 5 C. Rob. 174. (2) (1855) Spinks, 281.
(3) (1803) 5 C. Rob. 41.

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and *Darby* with him) for the Naval and Marine Forces. The proceeds of sale of the vessels condemned by the Prize Court in Egypt are droits of the Crown. The hand of violence was not put on these vessels by the British Government until they were outside the territorial waters of Egypt. The "hand of violence" referred to in *The Maria Francoise* (1) obviously meant the hand of violence applied by the ships of the nation that seized the vessels as prize. The Egyptian Government did not seize any of these vessels as prize; it merely towed them out to sea in order that they might be captured by His Majesty's ships.

The admission of the Attorney-General with regard to *The Förde* makes it unnecessary to argue that case on behalf of the fleet. In the case of *The Leda*, and in the American meat-packers' case there have been decrees of condemnation, and the Crown cannot derogate from its own grant. Under the old practice, after condemnation the prize had to go to the captors; the right of releasing before condemnation was an implied exception in the grant of prize by the Crown: see *Stirling* v. *Vaughan*. (2) Even before condemnation, although the Crown had the right to release, it is only exercised in very rare cases and for reasons of State: *The St. Ivan*. (3)

If the Attorney-General's contention is correct, the Crown could have taken away the whole of the proceeds of ships and cargoes condemned as prize at any time before the Proclamation of August, 1918; but the policy of the Naval Prize Act and of the Proclamation was to include "all prizes captured in the present war," and in the case of *The Leda* and the American meat-packers' cases the value of the released property should be credited to the Naval Prize Fund.

As regards the Swedish copper agreement, the Crown has made a large profit by selling various parcels of the copper at a considerably larger sum than was paid to the Swedish claimants, and, although there appears to be no precedent for such a claim, the Naval Prize Fund ought to benefit to the extent of the profit.

(1) 6 C. Rob. 282.

(2) (1809) 11 East, 619, 622, 631.

(3) (1811) Edw. 376.

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[LORD PHILLIMORE. The nearest analogy would seem to be cases of pre-emption.]

The cargoes were put in prize, and the proceeds, over and above the sum paid to the Swedish claimants, come within para. 5 of Part I. of the Schedule: "any other sums received in respect of ships and goods subject to prize jurisdiction which the tribunal consider may reasonably be treated . . . . as being sums to which . . . . captors would have been entitled."

Cur. adv. vult.

June 5. The judgment of the tribunal (Lord Phillimore, Admiral of the Fleet Sir George Callaghan and Sir Guy Fleetwood-Wilson) was delivered by

LORD PHILLIMORE. The judgment which I am about to deliver deals with the various cases which were argued before the tribunal on March 28, and as to which we reserved our decision.

The first case we had to consider was that of five German vessels, the *Derfflinger*, *Pindos*, *Rostock*, *Heligoland*, and *Achaia*, and two Austrian vessels, the *Concadoro* and *Marquis Bacquehem*, which either were in Egyptian ports at the beginning of the war or reached them shortly afterwards. All of them but the *Marquis Bacquehem* declined to quit port, and all remained there till, under compulsion by the Egyptian authorities, they received on board a British crew sufficient to navigate them outside territorial limits. When they had been so navigated they were formally captured by some British commissioned men-of-war and taken to Alexandria, where they were condemned as prize either by the Egyptian Prize Court or by the Judicial Committee of the Privy Council upon appeal.

The question to be decided is whether the seizures which led to condemnation are to be considered as having been made when possession was taken of the vessels in port before they sailed out, or as being made by the men-of-war who did the act of formal capture at sea.

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In the first case, subject to any question which might arise between the British Crown and the Government of Egypt, they would be droits of Admiralty and pass to the Exchequer. In the latter case they would be droits of the Crown and pass into the Naval Prize Fund.

At the time when these things were done Turkey was not at war with Great Britain, and Egypt still remained under the suzerainty of the Ottoman Porte, and during the litigation it was contended on behalf of these German vessels that Egypt must be held to have been at that time a neutral country; but the Privy Council rejected this view holding that the territory, whether neutral or not, was in the actual military possession of the British Crown. Whether, even if this were so, captures in port would enure to the benefit of the Egyptian Government was, in the opinion of Cator J. of the Court at Alexandria, a doubtful point; and, when he adjourned the leading case on this subject for certain further inquiries, he directed that opportunity should be given to the Egyptian Government to put in a claim. But that Government declined so to do, and the matter, therefore, rests to be decided solely between the British Exchequer and the British Fleet.

It was urged before us on behalf of the Exchequer that, for the purpose of deciding whether the ships were lawful prize or not, both the Prize Court at Alexandria and the Judicial Committee had gone behind the formal captures at sea and had looked to the anterior circumstances and decided the several cases with reference to those circumstances, and that we should, in the same way, look to the anterior circumstances and conclude from them that the captures at sea were merely formal acts, and that the vessels had in truth been seized while they were in port and moved out to sea under the constraint of superior force, and that the so-called captures at sea were, in fact, merely incidental steps in the subsequent dealings with vessels which had been already captured.

But if this were so, the whole procedure of moving these vessels from an Egyptian port out to sea, bringing them into reach of a man-of-war, submitting them to a formal capture and bringing them back to an Egyptian port, was an unnecessary

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risk and expense, a purely dramatic and almost farcical act.

It is not for us to inquire minutely into the political considerations which, owing to the peculiar position of Egypt and the Convention, which for some purposes neutralises the Suez Canal, apparently induced His Majesty's Government to ordain this method of procedure. It is obvious that, either with a view of avoiding offence, or because it was doubtful whether seizure in port would be held to warrant a condemnation as prize, it was determined to have what may be called a clean act of capture at sea, and that the title to treat these vessels as prize was intended to be rested upon the capture at sea; and this being so, my colleagues and I agree that we must hold that these cases must be treated as captures at sea and as droits of the Crown, and that the proceeds must go to the Naval Prize Fund.

THE FÖRDE.

LORD PHILLIMORE. The next case which we had to determine is taken as a typical case for the purpose of ascertaining what is to happen to vessels which came into the Downs, and were there seized, with the result that they or their cargo, or parcels of their cargo, were ultimately condemned as prize. The typical case is the steamship *Förde*. She is a Norwegian vessel which, on January 22, 1916, in the course of a voyage from Brazil to Christiania, entered the Downs. She had as part of her cargo a large quantity of coffee out of which 3750 bags have been condemned as prize. It was understood that we should have to determine whether captures in the Downs were to be treated as captures at sea, in which case they would be droits of the Crown, or whether the Downs were to be treated as a port, creek or road of this Kingdom, in which case the patent of the Lord High Admiral would give the capture to him and the proceeds would go to the Exchequer. We were, however, relieved from deciding this point because it became manifest that the reason why the vessel proceeded to the Downs and anchored there, and remained at anchor till her papers had been examined and this cargo was captured,

was because the system of patrol established in the North Sea and the British Channel was such that every neutral or enemy vessel passing or about to pass through the Straits of Dover was compelled to proceed to the Downs and remain there till further orders, and that this case was, therefore, governed by our previous decision in the case of *The Florida* (1), where we held that it was the fear of His Majesty's Navy, and of capture at sea with all its incidents, which led the owners to direct the master to proceed and led the master to proceed to Kirkwall.

The Attorney-General, arguing on behalf of the Exchequer, saved the Court trouble by admitting that this must be so. We have no doubt about it, and, therefore, we decide that the condemned parcels of cargo on board *The Förde* and all similar cases must be droits of the Crown.

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Lord Phillimore. We now come to a group of cases which raise other considerations—i.e., the extent to which the Crown could in times past interfere with rights of captors by releasing captured vessels or cargoes or by discontinuing proceedings for their condemnation.

In all wars of any importance, except the Turkish war of 1807, for more than two centuries there has been either a prize statute or a Royal Proclamation or Order in Council giving to the vessels of His Majesty's Fleet all prizes taken after the outbreak of war except those which the Crown could not give, having already granted them to the Lord High Admiral. But it is settled law that this grant to the captors was to be construed as qualified in one respect. The Crown, whose officers conducted the prize proceedings, did not part with the right to release before adjudication vessels or cargoes captured as prize, and the captor was not entitled to proceed to adjudication or to require the Crown to proceed to adjudication. On the other hand, after adjudication the captor's right was considered to be vested and indefeasible.

Upon grounds of the highest policy it is most important that

(1) Ante, p. 41.

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this right of the Crown should not be questioned, and it is in terms saved or preserved by s. 1 of the Act under which this tribunal sits. It is, on the other hand, not to be forgotten that after adjudication the captor's title used to be regarded as indefeasible. There is, however, some reason to think that it required a formal sentence or decree to give the captors this indefeasible right. The leading authority for the proposition, though there are several other cases to support it, that the Crown has the right of releasing to which we have referred, is *The Elsebe*. (1) This vessel is evidently the same as *The Elsabe* (2), where it was treated as a typical case of the second Swedish Fleet which sailed under convoy in order to resist search. In the earlier case Sir William Scott in his judgment laid down the principles on which he held this resistance unlawful and as warranting condemnation; and the report concludes by the word "condemned." And yet she is the vessel which the Crown afterwards released, and in respect of which he upheld the right of the Crown to release. The point, apparently, has never been noticed. Probably the explanation is that no formal sentence or decree of condemnation was drawn up so as to carry out the language of his judgment. Possibly the advisers of the Crown had already anticipated that there might be negotiations with Sweden which would end, as apparently they did, in the release of these vessels. But the fact that, after having said that he condemned the vessels, he afterwards supported the release by the Crown, shows the extent to which, in his opinion, the powers of release could go.

We have now to apply these principles to the cases before us. The *Leda* was a vessel sailing under the German flag and having for her owners a German incorporated company. She was captured and taken to Bermuda and put into the Prize Court there, and condemned as prize (3.) It was then represented to the authorities that in substance the vessel was owned by the Standard Oil Co. of America, which had formed the German company because, owing to the ship having been built

(1) 5 C. Rob. 174.
(2) (1803) 4 C. Rob. 408.
(3) (1914) 1 Br. & Col. P. C. 233.

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in Germany, she could not be registered as an American ship. Upon this representation the Crown, as an act of grace, released her. Since the hearing of the argument copies of the actual documents have been obtained. The first document to which the marshal and the commander in charge at the dockyard are parties is in the following terms :—

"IN THE PRIZE COURT OF BERMUDA.

IN PRIZE, No. 1.

THE *LEDA* (RICHARD KLEMZ, *Master*).

"Whereas on the twenty-first day of November last the said ship *Leda* was by a decree of this Honourable Court condemned as good and lawful prize, and as taken by His Majesty's ship *Suffolk* : and whereas on the thirteenth day of January last the said Court made an order for the delivery of the said ship *Leda* to the Crown through the Lords Commissioners of the Admiralty ;

"Now therefore, I the undersigned Frederick Lennock Godet, Marshal of the said Court, do hereby certify that I have this day in pursuance of the said Order delivered the said ship to the Crown through the said Lords Commissioners of the Admiralty, through Commander Duncan Tatton Brown, Royal Navy, Commander-in-Charge of His Majesty's Dockyard at Bermuda, the duly authorised representative of the said Lords Commissioners for the purpose of such delivery.

"And I the undersigned Commander-in-Charge do hereby certify that I have this day on behalf of the Crown through the said Lords Commissioners accepted delivery of the said ship.

"As witness our hands this twentieth day of April one thousand nine hundred and fifteen.

(Sgd.) F. LENNOCK GODET, *Marshall.*

(Sgd.) D. TATTON BROWN,

Commander-in-Charge of the Bermuda Dockyard."

By the second document of the same date to which the commander-in-charge and the agent of the Standard Oil Co. are parties, the commander certifies that he has on behalf of

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the Crown released the ship to the company, and the agent certifies that he has accepted delivery.

A transaction in this form could not have occurred under the old law. The ship having been condemned, the captors' rights in her would have been vested, the ship would have been sold by the Marshal, and, if the Crown had been desirous of restoring her to her former owners, it would have had to have bought her at the sale.

If this transaction had occurred after the passing of the Naval Prize Act it is clear that it is the intention of the Act that such a prize, being a droit of the Crown, should enure for the benefit of the Fleet, and the Proclamation puts this in plain terms: "the net produce of all such prizes captured during the present war as shall be declared by the tribunal appointed under the said Act to be droits of the Crown, ... shall be paid into the Naval Prize Fund." The machinery by which this would be worked is para. 2 of part I. of the schedule: "(2.) Where any ship or goods condemned by any prize court, being droits of the Crown, have, whether before or after the condemnation, been delivered to the Crown . . . . a sum equal to the value of the ship or goods at the date of delivery together with interest from the date of such delivery."

Now does it make any difference that this transaction occurred before the passing of the Naval Prize Act? This is, no doubt, a question of some difficulty, but in the opinion of the majority of the tribunal it should be decided in favour of the Fleet. In principle there seems no reason why the almost accidental fact of the date of the transaction should deprive the Fleet of a right, and if the language of the statute be carefully scrutinized it points in the same direction.

To make the contention of the Exchequer good some words like "subsequent to the passing of this Act" ought to have been introduced into the paragraph. In this connection it may be noticed that s. 1 of the Act refers to "sums which have been or may be received." Therefore, upon the whole, we hold that a sum equal to the value of the *Leda* at the date of delivery together with interest which we fix

at 5% from April 20, 1915, the date of delivery, should be paid by the Exchequer into the Naval Prize Fund. For this purpose the value of the *Leda* must be ascertained. Probably it can be agreed; if not, further application must be made to the tribunal, and we will direct how it should be ascertained.

SIR GUY FLEETWOOD-WILSON. I greatly regret that I do not find myself in agreement with the judgment delivered by Lord Phillimore, in so far as it relates to the case of the s.s. *Leda*, and I propose to state the reasons which lead me to differ from the conclusion to which he and Admiral Callaghan have come.

It was submitted on behalf of the Fleet that the case fell literally within the words of para. 2 of part I. of the schedule to the Naval Prize Act, 1918, which prescribes the list of payments to be made into the Naval Prize Fund, and that payment into the Prize Fund should be made of the value of the ship notwithstanding that she had been already released at the time of the issue of the Prize Proclamation.

On behalf of the Treasury, it was contended that the Crown had, before the issue of the Proclamation of August 15, 1918, relating to the grant of prize money to the Fleet, released the *Leda* to the Standard Oil Co. of New Jersey; that the Crown was entitled to make this release, no grant of prize having been made at the date on which the ship was so released, and that the Crown, by the Proclamation of August 15, 1918, cannot be held to have granted to the Fleet the value of a prize already granted to other grantees.

It would appear to be an axiom of prize law that all prize belongs as of right to the King, and the condemnation by a Prize Court operates to confirm his title. It was not seriously contested on behalf of the Fleet that prior to the date of the issue of the Prize Proclamation the Crown had the legal right at its discretion to grant away prizes even after condemnation, but it was contended that if it did so it should make good to the Prize Fund the value of such prizes.

Under the practice adopted in former wars it appears to

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me that the Crown had the right to dispose of prizes even after condemnation, before the issue of a Prize Proclamation granting prizes to the captors. It may well be that the Crown did not often avail itself of this right because the encouragement of privateers rendered the issue of a Prize Proclamation essential immediately after the outbreak of war, but this consideration does not, I think, affect the question that legally the Crown had the right to release condemned prizes up to the date of the issue of the Prize Proclamation.

The case of the *Elsebe* (1) or *Elsabe* (2) cited by Lord Phillimore would however seem to be an instance of the exercise of the right.

The question therefore is whether the Naval Prize Act, 1918, and the Prize Proclamation of August 15, 1918, affect this right.

So far as I am able to understand the law a statute does not possess retro-active force unless it is expressly stated to do so, and the Fleet can only succeed in their contention if the Naval Prize Act, 1918, and the Prize Proclamation are given retro-active effect from a date antecedent to the release of the *Leda*. Although the Act and Proclamation deal with ships and cargoes captured since the outbreak of war, and therefore prior to the passing of the Act and issue of the Proclamation, they must, I think, be construed to apply to ships and goods in the possession of the Crown at their date, and I cannot find in the Naval Prize Act anything to give it any such retro-active effect as is required to include the *Leda* within its scope, nor anything to indicate that it was the intention of the Proclamation to grant to the Fleet the value of prizes which had already been ceded to other grantees.

In coming to this conclusion I think I am fortified by s. 5 (2.) of the Naval Prize Act, 1918, by which it is provided as follows: "(2.) Nothing in this Act shall be construed as prejudicing or affecting any prerogative or right of His Majesty to grant or release any ship or goods subject to prize jurisdiction, or the proceeds of sale thereof, or money representing the same, or to grant or release any droits of the Crown."

(1) 5 C. Rob. 174. (2) 4 C. Rob. 408.

If I am correct in my belief that the Crown had a legal right to release this ship before the issue of a Prize Proclamation, it seems to me clear that the right is preserved notwithstanding any other words in the Act which at most appear to be ambiguous.

In my opinion it is clear from the general tenor of the Naval Prize Act, 1918, and the Proclamation, that it was only the intention to grant to the Fleet the value of prizes being droits of the Crown which remained in the hands of the Crown at the date of the issue of the Proclamation.

At that date the *Leda* was no longer the property of the Crown to grant away, nor was the Crown in possession of any assets representing her value. I am unable, therefore, to see how the grant to the Fleet can include her value.

I am also of opinion that para. 2 of part I of the schedule—Payments into the Naval Prize Fund—relates only to vessels which were held by the Crown at the time of, or subsequently to, the passing of the Act, and has no application to vessels which had been released before that date. That the words of the paragraph must be read with some limitation is clear to me, for if this were not the case the Crown would be liable to pay into the Prize Fund the value of a ship which had been delivered to it, and afterwards returned to the Admiralty Marshal, notwithstanding that the Prize Fund would thereby receive the value of the ship twice, once from the Crown and once from the sale of the vessel by order of the Court.

It seems clear that this is not the intention or the meaning of the Act, and in considering what limitation is to be imposed, I hold that it is in accordance with the intention of His Majesty and of Parliament, and in accordance with the dictates of good sense, that the grant to the Fleet should be limited to those prizes or their value or the proceeds of their sale, which were in the possession of the Crown at the date of the issue of the Proclamation or came into their possession thereafter.

For these reasons I am unable to agree that the value of this vessel should be paid into the Prize Fund.

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IN THE MATTER OF THE AMERICAN MEAT PACKERS AGREEMENT.

LORD PHILLIMORE. Before the war large quantities of meat were consigned from the United States to Germany. After the outbreak of war, when it became impossible, owing to the British blockade, to send shipments direct to Germany, the practice was adopted of sending them to Denmark and the other Scandinavian countries. When the enormous increase in these consignments attracted attention, some of the vessels conveying them were seized and put into the Prize Court, and large portions of their cargoes were ultimately condemned. Their cases are reported as the *Kim*, *Alfred Nobel*, *Bjornsterjne Bjornson* and *Fridland*. (1)

Notwithstanding these seizures, further consignments began to come forward and were also seized, and prize proceedings were begun. At this time the United States was a neutral country, and the political influence of those engaged in the trade was thought to be considerable and the interests involved were large. It was just one of those cases where the importance of preserving the Crown's rights to release for political reasons was made manifest. Accordingly, an arrangement was arrived at by which, while the previous condemnations were maintained and while the cargoes in the Prize Court were brought to formal adjudication, 93% in some cases, and 90% in others, of the values of the cargoes were to be returned to the meat packers. The method of carrying out this arrangement was to obtain a decree from the Prize Court, the material part of which is as follows: "Upon the application of counsel for H.M.'s Procurator-General, counsel for Armour & Co. and the respective solicitors for Sulzberger & Sons Co., Swift & Co., Morris & Co. and G. H. Hammond being present and not objecting, the President condemned as good and lawful prize of war the part cargoes (or the proceeds of sale thereof) of the above vessels, claimed by the above-named claimants (save and except the part cargoes or the proceeds of sale thereof of the steamships *Artemis*, *Dronning Olga*, *Hellig Olav* and *Louisiana*, claimed by Sulzberger & Sons, Co.) subject

(1) [1915] P. 215.

to the terms that out of the proceeds of sale of such part cargoes there be paid out to Chandler P. Anderson of the Ritz Hotel, W., by authority of and on behalf of the above-named claimants jointly the sum of 634,937*l.* as being an agreed amount representing 75% of such proceeds or estimated proceeds. Dated the 14th day of April, 1916."

It should be observed that under this decree only 75% was to be paid back to the packers leaving 25% in court, the difference between 75% and 90% or 93%, as the case may be, seems to have been met by payment out of the Exchequer. At any rate no claim is now preferred by the Exchequer to the 25% which remains in the Prize Court and has already been adjudicated upon by us. But the counsel for the Fleet have contended that the Exchequer should bring back the 75% into the Prize Court so that we may adjudicate upon it. To this claim two answers have been made. The first answer is that the true meaning and business of the transaction was that the Crown thereby exercised its power of release as to three-quarters of the cargoes which had been seized. If the cases had proceeded to a final hearing the Crown might have succeeded or might have failed, or might have succeeded in part and failed in part, and therefore it was reasonable to effect a compromise. Or, even supposing that there was no doubt that all the cargoes would have been condemned, the exercise of the Crown of this power of release was justified by political considerations. If the old law and practice had prevailed, and there had been a Prize Act or Proclamation vesting captures in the captors, the form which the proceedings would have taken in order to avoid cavil would probably have been different. The Crown would have procured condemnation of specific parcels amounting to 25% and would have released all the rest. If the Naval Prize Act under which we sit had been in force at the date of the transaction a similar course would probably have been taken also to avoid cavil. But in substance the result was the same. The counsel for the Fleet relied upon the fact that all was condemned, but the same decree which condemned all embodied a release of three-quarters, and it is not open to

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a party to take advantage of one part of a decree and reject the rest.

The other answer rests upon the language of the Naval Prize Act. This Act directs that there shall be paid into the Naval Prize Fund the sums which have been or may be received in respect of ships and goods captured during the present war specified in part I of the schedule to the Act, and when reference is made to the schedule there is no provision in its five paragraphs which would cover these sums. The only possible paragraph is the first:—Part I (1.) "Any money in court paid in respect of any ship or goods condemned by any prize court, whether in the United Kingdom or elsewhere, being droits of the Crown, together with any accumulations of interest accrued on any such money"; and that will not do because there was not at the date of the passing of the Act and has not been since any such "money in court." Either answer, either the one of substance or that which may be called the technical one, seems to us sufficient, and accordingly we decide that there is no claim upon the Exchequer to bring back into the Fund the 75% which has been paid out.

IN THE MATTER OF CERTAIN SWEDISH COPPER.

LORD PHILLIMORE. These parcels of copper, which were originally intended for Sweden, were seized and landed at various ports in this country, and proceedings were taken in the Prize Court but not carried to adjudication. Eventually the copper was released and delivered to the Crown, the transaction taking the following form: A letter was addressed by the Procurator-General to the Admiralty Marshal informing him that consent had been given to an order for release of the "undermentioned consignments of copper which should be delivered to the order of His Majesty's Government who hold the bills of lading." Thereupon the letter was filed in the registry and the terms of it were recorded in the cause books, and the actual delivery of the bills of lading ensued. In two of the cases an order of Court was made upon the application of the Procurator-General that he might be at liberty to discontinue the cause. In the other case or cases

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no formal order seems to have been required by the Prize Court.

Some part of the copper was taken over by the War Office and Ministry of Munitions. Other parcels were sold and the profits realized amounted to 18,741*l.* 1*s.* 5*d.* No claim is preferred on behalf of the Fleet to the copper or to so much of its proceeds as is equivalent to the sum paid to the owners of the copper; but a claim is preferred to have the profits above mentioned brought into the Naval Prize Fund, and this we have now to consider.

The substance of the transaction was that the Crown, instead of proceeding to take its chance of adjudication followed by an open sale effected by the Marshal, made a private arrangement with the claimants. Such a transaction is unusual, and if it had taken place when the old law and practice prevailed, or had taken place since the passing of the Naval Prize Act, and if also the copper would have been certainly condemned as contraband, would have been irregular. It should, however, be observed that there is no reason to suppose that the copper was deliberately purchased at an under value, and it is the case that in other copper transactions of a similar nature there was no profit and in one case a loss. Even were we to consider the transaction as irregular, it is difficult to see how if it had occurred in the old days it could have been successfully impeached, especially when one recollects the strength of the language in which Sir William Scott in *The Elsebe* (1) laid down "that the Crown is completely dominus litis, and also dominus rei litigatae, supposing there is no claim maintainable on the part of any neutral proprietor." And, if the transaction could not have been impeached, one has further to look to see whether there was any known mode of procedure by which the captors could have entitled themselves to all or any part of the profit. For it was admitted by counsel for the Fleet that the only way in which the claim could be supported under the Naval Prize Act was by bringing it under para. 5, part I, of the schedule which is as follows: "(5.) Any other sums received

(1) 5 C. Rob. 174, 185.

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THE AMERICAN MEAT PACKERS' AGREEMENT, *In the matter of.*

CERTAIN SWEDISH COPPER, *In the matter of.*

Lord Phillimore.

in respect of ships and goods subject to prize jurisdiction which the tribunal consider may reasonably be treated, having regard to the principles and practice heretofore observed by prize courts, as being sums to which, had there been a grant of prize to captors, captors would have been entitled."

During the argument no precedent for any analogous claim under the old law was put before us; but we gave opportunity for further research, and it was suggested from the bench that the nearest analogy might be found in the doctrine of pre-emption, which will be found fully stated in Sir Robert Phillimore's Commentaries on International Law, vol. iii., ss. 267 to 270, and Sir William Scott's decision in *The Haabet.* (1) Pre-emption is described as a milder belligerent right than compensation and as a fair compromise between the right of the belligerent to seize and the claim of the neutral to export his native commodities, though immediately subservient to the purposes of hostility. When commodities were thus taken, according to the practice of the British Prize Court, a profit of 10% was usually allowed to the proprietor of the goods seized for the purposes of pre-emption.

Since the argument in court the tribunal has been assisted by careful papers from both sides on the subject of pre-emption and on the practice of purchase, pendente lite, by the Government, of Naval stores when forming the cargoes of vessels brought into the Prize Court, a matter which has however only a remote connection with the subject to be considered.

If it had appeared that the practice in cases of pre-emption had been to treat the captors as thereby acquiring any interest in the prize analogous to that which they would have got on a condemnation, or to give them any allowance or gratification, it might be right to hold that para. 5, already quoted, would warrant the tribunal in decreeing some money payment to be made to the Naval Prize Fund in respect of the profit on this transaction in copper, and the Attorney-General, acting for the Exchequer, did not dispute the jurisdiction

(1) (1800) 2 C. Rob. 174.

of the tribunal to make such an order. But no precedent having been produced there is no warrant for this tribunal making any such order; and we must, consequently, disallow this claim.

It only remains to say that, we think that the costs of the counsel for the Fleet should be paid out of the Naval Prize Fund.

Solicitor for the Exchequer and for the Naval and Marine Forces: *The Treasury Solicitor.*

E. C. T.

[IN THE COURT OF APPEAL.]

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June 23, 24.

MARTIN *v.* MARTIN.

Judicial Separation—Practice—Order for Permanent Alimony—Income of Respondent—Computation—Voluntary Allowance—Reviewing Order—Divorce Rules, r. 92.

Upon an application for an order for permanent alimony by a wife who has obtained a decree for judicial separation, the Court, in assessing the amount to be paid by the husband, will take into consideration a voluntary allowance made to him by trustees under a discretionary trust to apply the income of a fund for the maintenance and support or otherwise for the benefit of all or such one or more exclusively of the other or others of the husband, wife, and their issue.

But if in such a case the trustees should subsequently formulate a scheme for the application of the income of the fund for the maintenance of the husband and his wife and issue the Court will have jurisdiction under r. 92 of the Divorce Rules and Regulations to review the order, and discharge or suspend it.

Malo v. *Malo* (1786) 2 Sw. & Tr. 657; *Clinton* v. *Clinton* (1866) L. R.1 P. & M. 215; *Moss* v. *Moss* (1867) 15 W. R. 532; and *Bonsor* v. *Bonsor* [1897] P. 77 followed.

Decision of Lord Coleridge J. affirmed.

APPEAL from a decision of Lord Coleridge J.

The petitioner, Ida May Martin, was married to the respondent, Noel Martin, on December 3, 1898. There was one child of the marriage, a boy of about 19 years of age. A few years after his marriage the respondent began to suffer

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from epileptic fits, and was in 1914 certified as a lunatic. In August, 1917, the petitioner left him under advice, and he then went to live with his mother, where he was nursed by a woman with whom he afterwards committed adultery and with whom he was now living.

On May 9, 1918, the petitioner obtained a decree for judicial separation.

On November 30, 1918, the petitioner presented a petition for permanent alimony, in which she alleged that the respondent "is now possessed of or entitled to the income amounting before deduction of tax to the sum of 430*l.* per annum, or thereabouts, under the will dated October 20, 1899, of his father, the late William Martin, of the City of Birmingham, architect, and of whose will the present trustees are believed to be the testator's widow, Esther Jane Martin and his son Herbert Martin."

In answer to the petition the respondent made an affidavit in which he stated: "I was entitled to the income from a sum of 10,000*l.* under my father's will as alleged in the said petition, but I have forfeited the said income by bankruptcy and am now being supported by a voluntary allowance made by the trustees of the said will. Save as aforesaid I have no property means or source of income whatsoever."

Herbert Martin, the petitioner's brother and one of the trustees of the will, also made an affidavit in which, after repeating in effect the same facts with regard to the nature of this income, he stated that: "For the year 1917–1918 the net income from the said fund was 393*l.* 4*s.* 4*d.* This income the trustees have in their discretion applied for the maintenance of the respondent, who has no other means or resources. The respondent is of unstable mind. He is subject to fits, and has been admitted under certificate to a lunatic asylum. Owing to his condition he requires some one to constantly look after him, and also having regard to such condition and age of his mother (80 years) he cannot become a resident in her home."

The respondent was adjudicated a bankrupt on April 2, 1910.

By the will of William Martin, the respondent's father, the

trustees were directed out of the share of his son Noel Martin in his residuary estate to provide and set aside a sum or fund of 10,000*l.* and to stand possessed thereof and of the investments from time to time representing the same (thereinafter referred to as 'Noel Martin's trust fund') "upon trust to pay the income thereof unto or to permit such income to be received by my son Noel Martin until he shall assign charge or otherwise dispose of the said income or some part thereof, or become bankrupt, or do, or suffer, something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to, or vested in, some other person (whichever of the said events shall first happen), and if the trust hereinbefore declared shall determine in the lifetime of the said Noel Martin then in trust during the remainder of the life of the said Noel Martin to pay and apply the income of Noel Martin's trust fund for the maintenance and support or otherwise for the benefit of all or such one or more exclusively of the other or others of the said Noel Martin and his wife and his issue for the time being (if any) or if he shall for the time being have no wife or issue living then for the benefit of all or such one or more exclusively of the other or others of the said Noel Martin, and his brothers, sisters, nephews and nieces for the time being in such manner in all respects as my trustees in their uncontrolled discretion shall think fit, and from and after the decease of the said Noel Martin then in trust to pay out of the income of Noel Martin's trust fund the sum of 50*l.* a year clear of deductions to his widow (if he shall leave a widow) during her natural life and subject to such payment from and after the death of the said Noel Martin my trustees shall stand possessed of the capital of Noel Martin's trust fund in trust for the children of the said Noel Martin or any of them, or any of their issue, in such shares if more than one, and in such manner as the said Noel Martin shall by any deed or deeds or by will appoint, and in default of such appointment, and in so far as any such appointment shall not extend in trust for all the children of the said Noel Martin, who being male shall attain the age of 21 years or being female shall attain that age or marry in equal shares, and if there shall

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be only one child the whole to be in trust for that one child."

By an order dated May 21, 1919, Mr. Registrar Barnard ordered that "Noel Martin, the respondent, do out of his present income and until further order pay or cause to be paid to Ida May Martin, the petitioner, permanent alimony at and after the rate of 2*l.* 10*s.* per week, to commence from the date of the final decree in this cause and to be payable weekly. Free of income tax."

On June 2, 1919, Lord Coleridge J., on an appeal by the respondent affirmed the Registrar's order.

The respondent appealed.

Micklem K.C. and *W. O. Willis* for the respondent. The question is whether under the circumstances of this case there is any fund out of which the Court can order alimony to be paid. The trustees take the view that their discretion under the will ought not to be fettered.

[WARRINGTON L.J. The Court has no jurisdiction to interfere with the discretion of the trustees.]

There is no case in which an order has been made for alimony where the husband was only entitled to such an allowance as the trustees should in their discretion think fit to make him. *Haviland* v. *Haviland* (1) is in the respondent's favour. It was there held that the Court ought not to order payment of alimony out of a voluntary allowance. In *Clinton* v. *Clinton* (2) the order was made in the form that the alimony should be payable only so long as the respondent was in receipt of a rent charge which was voluntarily paid to him by the trustees. In the present case the wife could have gone to the trustees and asked them to exercise their discretion in her favour. It is a good ground for setting aside the order that the husband has no moneys coming to him. The judge made the order in order to put pressure on the trustees. It would have been open to the petitioner to take proceedings under s. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

[WARRINGTON L.J. The trustees appear to have thought only of the husband and not of the wife.]

(1) (1863) 3 Sw. & Tr. 114. (2) L. R. 1 P. & M. 215.

The trustees have always been ready to make a reasonable allowance to the wife. The judge had no evidence before him of any money payments being made to the respondents. It is submitted that the Court should adopt the course taken in *Clinton* v. *Clinton* (1) and ascertain from them their views. Where it is not shown that any money payments are being made to the husband it is a novel thing for the Court to make an order for alimony against him. In the present case the money has been applied by the trustees in payment of the respondent's rent and housekeeping bills. In *Moss* v. *Moss* (2) and *Bonsor* v. *Bonsor* (3) it was admitted that money had been paid to the husband. In the present case the evidence is that the respondent has been maintained but has no property. The Court will not impose an obligation on him to pay money unless it is satisfied that he has the means to discharge it. It cannot be said in this case that there is any money coming to the respondent.

[WARRINGTON L.J. referred to r. 92 of the Divorce Rules.]

[*Bayford K.C.* Maintenance is governed by the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12). Rule 92 comes in as the result of s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).]

It is submitted therefore (1.) that the respondent has no money out of which the alimony can be paid; (2.) that there are no means of enforcing an order for alimony, if made; and (3.) that where there is a mere discretionary trust in favour of several persons and there is no evidence that it has been wrongly exercised the Court ought not to make an order fettering the discretion of the trustees. The order of Coleridge J. was therefore wrong and ought to be set aside.

Bayford K.C. for the petitioner. The evidence is that the trustees are paying the whole of the income of the fund to the respondent for his personal use and are leaving the petitioner and her son without any provision. The question to be considered is what in fact is the income that the respondent has been enjoying. The authorities show

(1) L. R. 1 P. & M. 215. (2) 15 W. R. 532.
(3) [1897] P. 77.

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that the Court has ample jurisdiction to make the present order: *Eaton* v. *Eaton* (1); *Walton* v. *Walton* (2); *Nott* v. *Nott*. (3) Those cases show that the Court has always taken into account a voluntary allowance received by either of the parties in assessing the amount to be paid by the respondent. Rule 92 of the Divorce Rules gives the Court power to increase or diminish the amount of the alimony according as the faculties of the husband increase or diminish.

[ATKIN L.J. referred to *Earnshaw* v. *Earnshaw*. (4)]

Micklem K.C. in reply. All the cases referred to were cases in which an allowance was made to the husband. Here the money was applied for his benefit.

[DUKE L.J. referred to *Malo* v. *Malo*. (5)]

WARRINGTON L.J. stated the facts substantially as above set out and continued: In those circumstances it is contended on behalf of the appellant that the order in question was one which ought not to have been made, and that the case ought to have been treated as if the husband had no income or means. It is said, and said truly, that the husband has no legal right to insist upon payment to him of any part of the income of this fund; he has, however, a right, in common with his wife and child, to insist upon the exercise by the trustees of their discretion to apply the income of this fund, but so long as the trustees bona fide and properly exercise their discretion it is not the practice of the Court having jurisdiction in these matters to interfere with them. Nothing I propose to say must be taken to amount to any such attempt, or even to any suggestion, that this Court in any way interferes with their discretion. But the question remains whether the husband is not now in the enjoyment of an income of such a nature that, according to the now apparently settled principles of the Court, it should be taken into account in determining whether any, and if any, what sum, should be allowed for the wife's maintenance.

Now the facts with regard to this income must be supple-

(1) (1870) L. R. 2 P. & M. 51.
(2) (1900) 64 J. P. 264.
(3) [1901] P. 241.
(4) [1896] P. 160.
(5) 2 Sw. & Tr. 657 n.

mented by this, that so far as can be judged from the return made by the husband for income tax when he and his wife were living together, this income was treated by him as his own, and he obtained the allowance to which he was entitled on that footing. The husband's affidavit in answer to the petition states that he is being "supported by a voluntary allowance made by the trustees of the will," and that "save as aforesaid I have no property, means, or sources of income whatsoever." He, therefore, apparently treats the voluntary allowance by the trustees to which he refers as being in some sense a means, or source of income. The affidavit of the trustee merely states that the income is being applied for the maintenance of the respondent. That is ambiguous. It may well be so applied by payment of the income, or a large portion of it, to the husband himself, or to the woman with whom he is now living, but there is, at all events, sufficient evidence before the Court to justify it in acting upon the footing that the husband is now enjoying, in some form or another, the income which is applicable for the benefit of himself, amongst other persons, under the trusts of his father's will.

With regard to the principle upon which the Court acts in these matters, we have been referred to several authorities in which, especially of recent years, voluntary allowances received either by the husband or the wife have been taken into account in determining whether any, and if any, what sum, should be allowed for the alimony of the wife. It appears that in *Haviland* v. *Haviland* (1), in 1863, the Judge Ordinary decided that the voluntary allowance made to a husband by his mother was not to be taken into account, but he refers to a previous case of *Malo* v. *Malo* (2) decided by Dr. Wynne in 1786, which is reported in a note to *Beavan* v. *Beavan* (3), in which that learned judge did take into account a voluntary allowance made to a husband by his father, saying that the Court was, in some instances, obliged to judge of the husband's faculties according to appearances; and in more recent years the practice appears to have been well settled.

(1) 3 Sw. & Tr. 114. (2) 2 Sw. & Tr. 657, n.
(3) (1862) 2 Sw. & Tr. 652.

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The first case to which we were referred was *Clinton* v. *Clinton*. (1) That decision is not directly in point, because the question actually decided was as to the enforcement of an order for payment of permanent alimony which had previously been made, but it is valuable as showing that an order such as is now in question had been made. In that case the husband was entitled to a rent-charge which was applicable in the event of his bankruptcy, which event happened, as the income here is applicable, at the discretion of the trustees for the benefit of the husband, and the trustees had, in fact, voluntarily, in the exercise of their discretion, paid that rent charge to the husband. That, therefore, was a voluntary allowance made by the trustees to the husband, and an order had been made, as in the present case: "That the respondent do out of his present income, and until further order of this Court, pay or cause to be paid to the petitioner, or Shaen & Roscoe, her solicitors, for her use, on their being authorized by writing under her hand, permanent alimony at the rate of 110*l.* per annum, to be payable quarterly, such payments to continue until the respondent satisfies the Court that payment to him of the rent-charge of 400*l.* per annum under the second codicil to the will of Henry Pelham Duke of Newcastle, deceased, has ceased." That is the first of the recent cases that was cited to us as showing that the Court did take into account a voluntary allowance as evidence of the means of the husband to be regarded on the question of the allowance of alimony.

It is unnecessary, I think, to refer to any of the other cases except *Bonsor* v. *Bonsor* (2), decided in 1897 by Sir Francis Jeune, which is the most recent case directly in point. There the whole income of the husband was a voluntary allowance made to him by his brother of 60*l.* a month as long as he resided out of this country. After reviewing the previous cases, including *Haviland* v. *Haviland* (3), *Clinton* v. *Clinton* (1), and *Moss* v. *Moss* (4), Sir Francis Jeune came to the conclusion that the voluntary allowance ought to be taken into

(1) L. R. 1 P. & M. 215.
(2) [1897] P. 77, 81.
(3) 3 Sw. & Tr. 114.
(4) 15 W. R. 532.

account, and ends his judgment with this statement: "Injustice to the husband is prevented by the provisions of the Act which allow the maintenance to be reduced or suspended, if his means of paying it fail." With reference to that last remark, it will be observed that it was made in a case in which the decree was for a dissolution of the marriage, and the allowance was an allowance which was technically called maintenance, and which is subject to the Matrimonial Causes Act, 1866, which deals only with decrees for dissolution of marriage, and maintenance to be given thereunder, but I think there is no dispute that under r. 92 of the Divorce Rules the Court in cases of judicial separation, as well as in cases of dissolution of marriage, has ample power to review orders for alimony according as the means of the parties increase or decrease.

Then it is said that we ought not to affirm the order of Lord Coleridge J. because the order when made is one that cannot be enforced. I am not at all satisfied that the order could not, in some form or another, be enforced, but whether that is so or not, if it appears, as I think it does appear, that the husband is in the enjoyment of the benefit of this income, it is open to the Court, according to the principles, and the practice pursued now for many years, to make an order fixing the amount of the alimony payable to the wife after taking into account the income which the husband is receiving. But I should like to add this, that the trustees, so far, have not formulated any scheme for the maintenance of the husband, wife and child. All that they have done up to the present is to continue, what they did while the husband and wife were living together, namely, to pay, or apply, the entire income for the maintenance of the husband. If the trustees see fit, as I cannot help saying that I hope they will, seriously to consider the position of the husband, the wife and the child, and formulate a scheme for the application of the income to the maintenance of these three persons, who are the only objects of the discretionary trust, and under that scheme to allow a fair sum for the maintenance of the wife, the Court will have ample jurisdiction at any time to review, or discharge,

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or suspend the present order. But in the existing circumstances the order is one which, in my opinion, the judge in the court below was justified in making, and no reason has been shown why this Court should interfere with the discretion which he exercised.

For these reasons I think the present appeal fails and ought to be dismissed.

DUKE L.J. I agree that the appeal fails. This is the first case in which the question here raised has come for decision before this Court. It has been discussed fully before us, and we have heard very cogent arguments on both sides. I think however it is necessary to add but very few words to what has been said by my learned brother in stating his grounds for dismissing this appeal.

It is to be borne in mind that an order for alimony is not an apportionment of part of the income of the husband to the wife, but it is an order for the payment by him of such a sum as is considered proper to be ordered to be paid for the maintenance of the wife "according to his faculties." That is an expression which is found in cases in the Ecclesiastical Courts, and in the rules which were framed shortly after the powers of the Ecclesiastical Courts were vested as they now are in the Divorce Court.

This matter has been many times the subject of consideration. The earliest case to which we have been referred is *Malo* v. *Malo* (1), and it is the decision of a very well known judge in ecclesiastical cases, Dr. Wynne, afterwards Sir William Wynne. That was a suit in the Probate Court to determine upon the facts in that case what the faculties of the husband were for the discharge of his duty of the maintenance of his wife, and alimony was ordered to be paid out of a voluntary allowance. There is authority in numerous later cases to the same effect as in that case. *Haviland* v. *Haviland* (2) is not really an authority to the contrary, for Sir Cresswell Cresswell there said that there is power in the Court in cases where the income of the husband is not an

(1) 2 Sw. & Tr. 657, n. (2) 3 Sw. & Tr. 114.

income to which he is absolutely entitled to consider what his faculties are for bringing into existence an income. Therefore there is not the absolute divergence of opinion which at first sight might be thought to exist, but from 1866 onwards there is a clear course of authority. There is a decision of Lord Penzance in *Clinton* v. *Clinton* (1), a decision of Sir James Wilde, afterwards Lord Penzance, in *Moss* v. *Moss* (2), and a decision of Sir Francis Jeune in *Bonsor* v. *Bonsor*. (3) There is also a decision of Sir Francis Jeune and Gorell Barnes J., afterwards Lord Gorell, in *Walton* v. *Walton*. (4) There is therefore authority for the proposition that the Court has to consider what are the prospective means of the husband for making provision for the discharge of his duties. It is quite true the Ecclesiastical Courts were accustomed to apportion a sum not exceeding a certain aliquot part of the income of the husband, but that practice does not in any way infringe upon the general principle. The Court may now not only take into consideration the income derived from a purely voluntary source, but it may also take into consideration, as was said by Sir Francis Jeune and Gorell Barnes J. in *Earnshaw* v. *Earnshaw* (5), the potential earnings of the husband, that which does not exist at all except in the will and capacity of the husband to bring it into existence—the potential ability of the husband. In that view of the law what had to be ascertained in *Earnshaw* v. *Earnshaw* (5), was what, upon the evidence which was before the Court, were the potential means of the husband for the discharging of his duty to his wife.

What is the evidence here ? The evidence here, which so far as it consists of admissions by the respondent, according to the practice of the Courts, is to be taken against him, is this, that he has made a perfectly distinct answer, and that he has produced an income tax return for the year 1917. His answer states that he is in receipt of an income under the voluntary trust which is here in question, and that he has no other property, means or source of income. To my mind, and as Atkin L.J. has pointed out, the fair inference from the production of the income tax return

(1) L. R. 1 P. & M. 215.
(2) 15 W. R. 532.
(3) [1897] P. 77.
(4) 64 J. P. 264.
(5) [1896] P. 160, 162.

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is that the state of things which existed in 1917 was the state of things which continued in 1918, and continues at the present time; there is no indication to the contrary, and the affidavit of the respondent's brother, who is one of the trustees, does not contain evidence to the contrary. It is entirely consistent with the sworn statement of the respondent that he has an income from the voluntary source which is here in question. But I would add that his income is not entirely voluntary, and that the respondent has an interest in this income which was not to be found in the case of the respondent in either *Haviland* v. *Haviland* (1) or *Bonsor* v. *Bonsor*. (2) Upon that evidence I think the learned registrar, a former and very experienced practitioner in the Divorce Court, and the learned judge, were warranted in the order which they made. Not only is it not shown that the order ought to be disturbed, but it could not properly be disturbed because the matter was within the jurisdiction of the Court below, which has very properly exercised its jurisdiction upon the evidence before it. Emphasis has been laid upon the question raised whether the income comes to the hands of the respondent. That, to my mind, is disposed of by his evidence. The real question is as to whether it will continue to do so. That must be entirely a forecast. It has continued to come to his hands for a long time. When it ceases to come to his hands, if the trustees in the exercise of their discretion dispose of the whole of this fund so that no part of it can pass through the hands of the respondent to the hands of the petitioner, that may deprive the petitioner of any means of livelihood from the respondent. I cannot conceive that that state of things could exist unless the petitioner were guilty of such gross misconduct as to disentitle her to the consideration of the trustees. I quite agree with what Mr. Micklem said, that there may be a change in the circumstances. I can conceive the trustees taking into account what has been said by the Court, and considering it their duty to formulate a scheme—not to bind them in perpetuity, but by which they would allocate this income between these various persons who have a claim upon the income, and if the result

(1) 3 Sw. & Tr. 114. (2) [1897] P. 77.

should be that a sum such as the registrar has indicated, or any other sum, be it larger or smaller, should be paid as a voluntary payment to the petitioner, as in the past a voluntary payment has been made to the husband—as soon as that assumes any character of regularity it is open to the parties to go again to the registrar and say that a variation in the order ought now to be made.

It seems to me, in the circumstances as we now know them, the order was consistent with the settled practice—a very proper and just practice—of the Divorce Division. It is an order which does no injustice between the parties, and therefore it should stand.

ATKIN L.J. I agree. The question before the learned registrar and the learned judge was whether they were entitled to take into account the income of the trust fund payable by the trustees under the discretionary trust in the circumstances which have been stated to the Court.

I think the first principle to be observed is this. In dealing with the question of permanent maintenance after dissolution of marriage, or permanent alimony after judicial separation, what the Court has to consider is not whether or not the respondent has rights of property over the particular money that he receives, but whether he has the ability to make suitable payments for the support of his wife, and in considering that question it seems to me plain upon principle, and also upon authority, that the Court is to take into account the means that he in fact receives, whether or not he has the legal right to receive them. The Court has only to consider the question of ability to pay. The question of maintenance is made plain by the Matrimonial Causes Act, 1866 (29 and 30 Vict. c. 32), which after reciting that "whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured"—that has reference to s. 32 of the Act of 1857—"but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives," by s. 1 enacts: "In every such case it shall be lawful for the Court

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to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit." And although it is true that the provisions as to permanent alimony derive their force not from that statute, but from the Act of 1857, which applies the old procedure of the Ecclesiastical Courts, I can see no difference of principle when you are considering the ability of the husband to pay.

In these circumstances, the only question to my mind that remains is whether there was evidence before the learned registrar of the ability of the husband to make these payments. That must mean the present ability to make future payments, and it appears to me that there is ample evidence. The trustees have an uncontrolled discretion to apply the whole of the income of this trust fund for the benefit of the husband, or the wife, or the child, and while the husband and wife were living together, as they did up till 1917, it appears to me there is evidence that the husband received the money from the fact of his making a return for income tax purposes. At that time I think he was able, if he had so desired, to make an allowance of 130*l.* a year towards his wife's maintenance, and as far as the evidence is concerned it appears to me that not only is there no evidence of a change, but the evidence points to there having been no change in fact. There is evidence that the wife herself has received nothing from the trustees; they must pay the income to one of the three, and they are paying it to the husband.

In these circumstances it appears to me there is evidence of his ability to pay in the future 130*l.* a year—2*l.* 10*s.* a week—to his wife, and therefore it appears to me the order was right.

I agree that the trustees have a discretion, that it is their discretion, and not the discretion of the Court. I do not think

anything which has been said by the Court amounts to any kind of criticism of the conduct of the trustees. At the present moment it is obvious that if possible, and we think it is possible, the husband ought to provide for the maintenance of his wife to whom he has been married for twenty years, by whom he has a child and against whom he has committed the matrimonial offence that has been proved against him. It may very well be that the trustees will take the view that it is their duty, in the interests of both the wife, whose claims they have to consider, and, indeed, in the interests of the husband, if they look to his interests alone, that they should make some provision for the innocent wife and the innocent child, and if they do so we in no way fetter any kind of arrangement that they may make. If they do make an arrangement in the exercise of their discretion in favour of the wife and the child, then the circumstances will be reviewed, and as the Court has said, there may be ground for discharging this order, or varying it, or suspending it, as the Court thinks fit. That is a matter for them to decide. At the present moment I think there was ample ground upon which the learned judge could make the order he did make, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Burton, Yeates & Hart, for Johnson, Ekin & Keeling, Birmingham.*

Solicitors for the respondent: *Emmet & Co., for R. W. H. Green, Worthing.*

W. I. C.

P. D. 1919
Jan. 29, *Feb.* 24, *March* 17.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

EVERETT *v.* EVERETT AND McCULLUM.

C. A.
June 4, 5, 30.

Divorce—Wife's Suit for judicial Separation—Adultery of Wife—Cruelty, Condonation, Connivance and Conduct conducing—Wife's Offence continuing at Time of Suit—Bar to Relief—Divorce and Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 22, 31.

A wife living in an adulterous alliance, even though brought about by the procurement or connivance of her husband, cannot maintain against him a suit for judicial separation. The husband's connivance does not take such a case out of the general rule laid down in *Otway* v. *Otway* (1888) 13 P. D. 141.

A husband petitioned for divorce on the ground of his wife's adultery. The adultery was admitted, but the wife pleaded condonation, connivance and conduct conducing, and she brought counter charges of cruelty, and prayed for judicial separation. At the date of the petition she was still living in adultery. Lord Coleridge J. found that the wife's charges of cruelty against the husband were proved, and dismissed the petition. He granted judicial separation to the wife on the ground of the husband's connivance:—

Held, by the Court of Appeal, reversing the decision of Lord Coleridge J. upon the wife's claim for judicial separation, that the case must be decided on principles and rules as nearly as may be conformable to those on which the old Ecclesiastical Courts would have acted, and that those Courts would never have given relief to a wife under such circumstances.

In this case the husband in 1918 presented a petition for dissolution of his marriage upon the grounds of his wife's adultery with the co-respondent. The wife by her answer admitted the adultery, but alleged that the petitioner had connived at and by his conduct conduced to her adultery. She also charged her husband with persistent and aggravated cruelty, and asked for the custody of the children of the marriage and for such other relief as might be just.

The judge found upon the facts that the wife had committed adultery, but the husband had connived at it and been guilty of conduct conducing to adultery, and of cruelty. Upon those facts he dismissed the husband's petition for a divorce, but required argument upon the question whether the wife was entitled to a decree for judicial separation.

Tyndale for the respondent. The case must be decided according to the principles of the Ecclesiastical Courts under s. 22 of the Matrimonial Causes Act, 1857. If the wife were suing for a dissolution the Court could exercise its discretion under s. 31. That section does not apply here, but by analogy the Court has a discretion in the case of a wife's petition for judicial separation.

Otway v. *Otway* (1) appears to decide that in no case would the Ecclesiastical Courts grant a divorce a mensa et thoro to a wife who had committed adultery. But that is too wide a statement. In that case there was no condonation; it was alleged but not proved, and there are several cases to show that where adultery has been condoned it is no bar to the guilty party suing: *Anichini* v. *Anichini* (2); *Seller* v. *Seller*. (3)

The observations of Jeune P. in *Gooch* v. *Gooch* (4) show that *Otway* v. *Otway* (1) does not sweep away these ecclesiastical decisions.

Connivance is for this purpose equivalent to condonation. See *Hope* v. *Hope* (5), where Sir Cresswell Cresswell cites and approves a statement to that effect from Oughton. The reluctance expressed by Sir J. Hannen in *Grossi* v. *Grossi* (6) to adopt the principle that in no case could an adulterous wife obtain relief by way of judicial separation from her husband's cruelty does not seem to have been shared by the Court of Appeal in *Otway* v. *Otway* (1); but in *Grossi* v. *Grossi* (6) there was neither condonation nor connivance.

Skinner for the petitioner. *Otway* v. *Otway* (1) is in point and entirely covers this case. *Drummond* v. *Drummond* (7) is to the same effect. In *Gooch* v. *Gooch* (8) condonation is defined as "forgiveness evidenced by conduct and, according to English law, conditional on future good behaviour." That shows that connivance cannot, after a separation, be considered as on the same footing as condonation. On the findings in this case, which are connivance and conduct conducing to adultery, but not condonation, the wife cannot be said to be

(1) 13 P. D. 141.
(2) (1839) 2 Curt. 210.
(3) (1859) 1 Sw. & Tr. 482.
(4) [1893] P. 99.
(5) (1858) 1 Sw. & Tr. 94, 103.
(6) (1873) L. R. 3 P. & M. 118.
(7) (1861) 30 L. J. (P. & M.) 177.
(8) [1893] P. 99, 103.

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recta in curia because, as it is pointed out in *Moorsom* v. *Moorsom* (1), connivance presumes her guilt. Even condonation, whatever effect it may have as a bar to a husband's suit, cannot, if alleged in reply, destroy the defence where adultery has been committed : *Beeby* v. *Beeby*. (2)

Cur. adv. vult.

March 17. LORD COLERIDGE J. The husband sues for a divorce on the ground of the adultery of the wife. The wife admits the adultery, which has been proved. The wife recriminates on the ground that the husband has been guilty of cruelty, conduct conducing to, and connivance at her adultery, and prays for a judicial separation. I find that the wife's charges are proved against the husband. The husband's petition for divorce therefore stands dismissed.

Two questions then remain, (1.) whether under these circumstances the Court has power to make such a decree ; (2.) whether, if the Court has a discretionary power to make such a decree, it will exercise it in favour of the wife.

The Court's power to pronounce a sentence of judicial separation is given by 20 & 21 Vict. c. 85, ss. 16, 22. By s. 22 the Court must give relief " on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief " ; not necessarily on the principles that actually governed the former practice in those Courts (see *Hodgson* v. *Hodgson* (3)) ; for they recognized no status between freedom from the marriage tie, and union as from the first.

It has been urged that an adulterous wife can obtain no remedy against her husband, on the ground that she has committed a matrimonial offence, and that on these principles this would bar her remedy because she must come into court with " clean hands."

In *Otway* v. *Otway* (4) where husband and wife had both been guilty of adultery, and the husband of cruelty, the Court

(1) (1792) 3 Hagg. Ec. 87, 92.
(2) (1799) 1 Hagg. Ec. 789.
(3) [1905] P. 233, 238.
(4) 13 P. D. 141.

held that a judicial separation could not be granted to the wife, in spite of her husband's cruelty, because his cruelty did not justify her adultery, and she would not therefore, being guilty of adultery, come into court with "clean hands." Lopes L.J. remarking that the principle on which the Ecclesiastical Courts have acted in granting decrees for a divorce a mensa et thoro was (1): "that a wife or husband seeking such relief must come to the Court with a pure character, and must be free from any matrimonial misconduct"; and citing with approval *Drummond* v. *Drummond* (2), where Sir Cresswell Cresswell expressed the rule in similar language. And the reluctance which Sir J. Hannen expressed in *Grossi* v. *Grossi* (3) to adopt the principle that in no case could an adulterous wife obtain relief by way of judicial separation on the ground of cruelty, where it was a case of simple adultery, was not shared by the Court of Appeal in *Otway* v. *Otway*. (4) Is this doctrine applicable to all cases indifferently?

It is to be observed that in *Otway* v. *Otway* (4) connivance was disproved, and both there, and in *Drummond* v. *Drummond* (2), the case was one of simple adultery on the part of the applicant seeking relief.

If applicable to all cases indifferently, whether the adultery be condoned, conduced to, or connived at, I cannot reconcile it to the authority of other cases which were not explicitly overruled, and which are inconsistent with it.

In *Anichini* v. *Anichini* (5) in a suit for restitution of conjugal rights, the husband proved the wife to be guilty of adultery, the wife proved adultery on the part of the husband which had been condoned, and the husband was granted a divorce in spite of his adultery.

And in *Seller* v. *Seller* (6) where a wife sued for judicial separation on the ground of her husband's adultery, and the husband set up the wife's former adultery, it was held that such adultery was no bar to the wife's prayer for relief, because it had been condoned.

(1) 13 P. D. 152.
(2) 30 L. J. (P. & M.) 177.
(3) L. R. 3 P. & M. 118.
(4) 13 P. D. 141.
(5) 2 Curt. 210.
(6) 1 Sw. & Tr. 482.

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I think that a party cannot be precluded from obtaining relief by way of divorce because of adultery if that has been condoned. Such an adultery is not an absolute bar to relief. On the strict interpretation however of the doctrine of the Ecclesiastical Courts such a party cannot come into court with "clean hands." A sin has been committed against the marriage-bed, but the sin has been purged by condonation and is no longer a bar to relief. The offender has the good fortune of having a forgiving partner. But that does not alter the fact of the offence having been committed. It would seem therefore that the conduct of the parties towards each other, their relations, cannot be excluded from the purview of the Court. Condonation precludes the party from complaining of the offence which has been condoned. The original offence may be revived by a subsequent offence. But that does not alter the position, for the subsequent offence may in its turn be likewise condoned. If this be so, what is the position of an adulterous wife whose adultery has been procured and connived at by the husband? How, in this aspect, does connivance differ from condonation? The husband is not only a passive onlooker but an active participant in his wife's adultery. It must be clear that he could not set up his wife's adultery in an answer to a plea for judicial separation if he had himself connived at it. It is argued that the Court must intervene to refuse relief on the ground that the Ecclesiastical Courts would in no case give relief to an adulterous wife. But this Court can give relief if adultery has been condoned, and I think can do so also if adultery has been connived at. The excuse for the wife would be far stronger if her adultery had been procured and connived at than if it had been merely condoned, and the moral obliquity in breach of the marriage tie be less grave.

I think, therefore, that as the adultery in this case was procured and connived at, I am not precluded from exercising my discretion by the case of *Otway* v. *Otway*. (1)

As to discretion, in this case it has been proved that the husband has been guilty of gross and repeated acts of cruelty,

(1) 13 P. D. 141.

he has kept her and her children in terror of his drunkenness and violence; he has refused to cohabit with his wife, and has actually ordered her to sleep in his own house with the co-respondent; and under these circumstances I consider that I am justified in granting to the wife the judicial separation for which she prays.

The petitioner appealed.

J. R. B.

June 4. *Skinner* for the appellant. Lord Coleridge J. has held that the Court had a discretion under the circumstances to grant judicial separation on the ground that the connivance of the husband in the adultery of the wife took the case out of *Otway* v. *Otway*. (1) The judge gave leave to appeal on that question but refused leave on any other ground. This Court gave leave to appeal on the question of cruelty. He has decided that there is no difference for the purposes of this case between condonation and connivance.

[DUKE L.J. Is not connivance condonation in advance?]

It is regarded by the Ecclesiastical and State Courts as being different.

As to the charge of cruelty it is submitted that there was condonation except with regard to one act which did not amount to legal cruelty—it was not a matrimonial offence. To constitute legal cruelty there must be actual danger to life, or limb, or health, bodily or mental, or a reasonable apprehension of it: *Evans* v. *Evans*. (2) What was said by Lord Stowell in that case was cited with approval in *Russell* v. *Russell*. (3)

[DUKE L.J. referred to *Jeapes* v. *Jeapes*. (4)]

Drunkenness, and a series of annoyances and extraordinary conduct on the part of the husband, do not constitute legal cruelty. There must be an intention of cruelty (*Brown* v. *Brown* (5)); or actual violence of such a character as to

(1) 13 P. D. 141.
(2) (1790) 1 Hagg. Cons. 35.
(3) [1895] P. 315; [1897] A. C. 395.
(4) (1903) 89 L. T. 74.
(5) (1865) L. R. 1 P. & M. 46.

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endanger personal health or safety; or the reasonable apprehension of such violence: *Milford* v. *Milford*. (1) See also *Cousen* v. *Cousen*. (2)

[DUKE L.J. The real difficulty in this case arises upon *Otway* v. *Otway*. (3)]

The question is whether the Ecclesiastical Courts would have granted a decree in such a case as this. The strength of the appellant's position lies in this, that the wife was still living in adultery at the date of the petition.

[DUKE L.J. Lord Stowell thought the Court had a discretion to decree judicial separation to a guilty wife, and Sir J. Hannen indicated the same view in *Grossi* v. *Grossi*. (4)]

This case is covered by *Otway* v. *Otway*. (3)

In *Hope* v. *Hope* (5) it was held that a guilty wife, even though the husband had also been guilty of adultery, could not sustain a suit for restitution of conjugal rights. Sir Cresswell Cresswell there cited a passage from Oughton's Ordo Judiciorum (6), dealing with the causes which can be pleaded in bar of restitution.

The question of the effect of connivance by the husband at the wife's adultery is discussed in Brandt on the Law of Divorce (ed. 1858), p. 118. See also *Moore* v. *Moore* (7); *Stone* v. *Stone* (8); *Drew* v. *Drew* (9); *Anichini* v. *Anichini* (10); *Seller* v. *Seller* (11); *Gooch* v. *Gooch* (12); *Moorsom* v. *Moorsom* (13); *Lovering* v. *Lovering* (14); *Gipps* v. *Gipps* (15); *Hodgson* v. *Hodgson*. (16) A husband may condone, but he cannot connive at the continued misconduct of his wife.

G. C. Tyndale and *Latey* for the respondent. The real question is whether a wife who is continuing in adultery at the time of the petition can maintain a suit for judicial separation. Where the parties are in humble circumstances of life and the petitioner is guilty of conduct which would compel

(1) (1866) L. R. 1 P. & M. 295.
(2) (1865) 34 L. J. (P. & M.) 139.
(3) 13 P. D. 141.
(4) L. R. 3 P. & M. 118.
(5) 1 Sw. & Tr. 94.
(6) Tit. 214, 216.
(7) (1840) 3 Moo. P. C. 84.
(8) (1845) 4 Notes of Cases, 274.
(9) (1842) 1 Notes of Cases, 315.
(10) 2 Curt. 210.
(11) 1 Sw. & Tr. 482.
(12) [1893] P. 99.
(13) 3 Hagg. Ec. 87.
(14) (1792) 3 Hagg. Ec. 85.
(15) (1864) 11 H. L. C. 1.
(16) [1905] P. 233.

any ordinary woman to leave him, it is not right that she should be placed in a worse position than if she had gone through the farce of leaving the co-respondent during the hearing of the petition.

In *Otway* v. *Otway* (1) neither *Anichini* v. *Anichini* (2) nor *Seller* v. *Seller* (3) were cited. The Act of 1857 set up a new machinery giving the Divorce Court jurisdiction to dissolve the marriage in place of the Ecclesiastical Courts. The key section is s. 31. We do not seek to apply that section to this case, but the words in s. 22 " as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief " must have some effect given to them. If the guilty wife is in a position to prove adultery in addition to cruelty the Court has a discretion to give her relief even although her offence be continuing. Continued adultery is not an absolute bar to relief, because in many cases the custody of the children has been given to the guilty party.

[DUKE L.J. Is there any case in the Ecclesiastical Courts where relief has been given to the guilty party when the offence is continued ?]

It is submitted that the absence of such an authority is not fatal. Connivance is a rare plea and not often established. Here there is a combination of (1.) connivance, (2.) husband accessory, and (3.) conduct conducing to the adultery. Such a combination has never occurred. In the absence of authority, while the principle is clear that the applicant for relief must come with clean hands, on the facts of this case the respondent is not responsible for her offence. The husband procured it, and he is estopped from setting it up.

[DUKE L.J. Is it discretionary in the Court to take notice of such facts ?]

It would be the duty of the Court to inquire into them. The Court has gone back over and over again to the old Ecclesiastical rules, but yet under s. 31 relief has been granted to a guilty party. In the absence of direct authority it is submitted that

(1) 13 P. D. 141. (2) 2 Curt. 210.
(3) 1 Sw. & Tr. 482.

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the Court has a discretion which it will exercise in favour of the respondent.

Skinner in reply.

Cur. adv. vult.

June 30. WARRINGTON L.J. This is an appeal by the petitioner (the husband) against a decree of judicial separation pronounced by Lord Coleridge J. on the application of the respondent (the wife) on the ground of cruelty.

The petitioner takes two objections to the decree. First, that all acts of cruelty down to Christmas, 1915, having as he alleges been condoned there was no evidence of an act since that date which amounts to cruelty or which would revive the previous acts of cruelty. Secondly, that inasmuch as at the date of the decree the respondent was living in adultery with the co-respondent the judge had no power to grant her the relief she asked for.

The parties were married on April 12, 1903, and four children were born during wedlock, but the petitioner disputes the paternity of two of them. It was admitted that from 1913 onwards the respondent had been guilty of adultery with the co-respondent, and that since Christmas, 1916, she had been openly living with him.

The judge found that the petitioner was a man of violent temper, of drunken habits and of a brutal nature, and had committed acts of gross cruelty against his wife. At Christmas, 1915, he was home on leave and the wife then submitted to intercourse with him. It is this and this only which is relied on as condonation. At Christmas, 1916, he was, when drunk, guilty of gross and filthy acts in the presence of his wife. I may dispose of the first point at once by saying that even if it could be maintained that under the circumstances the submission to intercourse was sufficient evidence of condonation, which I do not think in this case it was, yet there was quite sufficient evidence in what took place at Christmas, 1916, coupled with the man's previous conduct, to justify the judge in holding that the charge of cruelty was established.

I now proceed to consider the second point—namely, whether the decree of judicial separation pronounced in favour of an adulterous wife whose adultery continued to the date of the decree can be justified. As to the husband the judge has found that he knew of, connived at, and was guilty of conduct conducing to the wife's adultery. The result of course was that he was refused the decree for dissolution for which he prayed. Then the wife prays for judicial separation. This relief, unlike the decree for dissolution which was the creature of the Matrimonial Causes Act, 1857, is the equivalent of a divorce a mensa et thoro granted by the Ecclesiastical Courts, and the Court is in this matter required by the Act to proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have hitherto acted and given relief.

In *Otway* v. *Otway* (1) it was decided by this Court that a wife who had been guilty of adultery was not entitled to a decree for judicial separation even when the husband had been guilty both of adultery and of cruelty. Cotton L.J. rests his judgment on the principle "that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce; and therefore on that ground she is not in a position to come to that Court to give her any relief as to any matrimonial offence which the husband may have committed." Fry L.J. points out that "not a single case can be found in which a decree of divorce à mensâ et thoro has been pronounced in favour of a wife who has been guilty of adultery."

It is contended however that the wife's adultery is not in all cases an absolute bar, and that the husband's connivance or condonation is a circumstance which may be sufficient to remove it. In support of this contention two cases, one in the Ecclesiastical Court, and the other in the newly created Divorce Court, are relied upon. The first is *Anichini* v.

(1) 13 P. D. 141, 150, 151.

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Warrington L.J.

Anichini. (1) In that case a husband who had committed adultery many years before the suit, and whose offence had been condoned by the wife, was granted a decree of separation against the wife, who was proved guilty of "gross and barefaced adultery." The ground of the judgment is quite clearly stated in the following passages. Dr. Lushington said (2): "It is difficult and dangerous to attempt to lay down any general rule; but I cannot go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife, under any circumstances which I can suppose. Take the case of a husband who had been guilty of adultery ten or twelve years before his wife's misconduct, under circumstances which might render it comparatively venial; that the wife was fully aware of the adultery, had condoned it, had continued to live with him, and had had children by him; that ten or twelve years after she is guilty of adultery herself,—would it be consistent with any principle that, under these circumstances, the husband should be entitled to no remedy at all? On the other hand there is no doubt that, in a case like *Beeby* v. *Beeby*" (3) (that was a judgment by Lord Stowell) "where the husband, after his offence is once condoned, repeats it, and shows himself utterly regardless of the marriage-vow, he does not come into court with clean hands, or anything like clean hands." And lower down he says: "Where a condonation has taken place with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfils the condition, and never after violates the obligations of the marriage-bed, is the condonation to have no other effect than to bar a suit against him? I think the effect is to make him rectus et integer, except that his past transgression may be revived by subsequent misconduct."

The other case was *Seller* v. *Seller*. (4) This was decided on demurrer, the petition stating that the wife, more than twenty years before, had committed adultery which had been

(1) 2 Curt. 210.
(2) 2 Curt. 218.
(3) 1 Hagg. Ec. 789.
(4) 1 Sw. & Tr. 482.

condoned. The judgment was founded on *Anichini* v. *Anichini* (1) as covering the point and carries the matter no further.

No case has been referred to in which the Court has ever entertained a suit by an adulterous spouse whose adultery continues down to the date of the proceedings, and I am satisfied that the Ecclesiastical Courts would never have entertained such a suit. The general rule is laid down in this court in *Otway* v. *Otway* (2), and it has not been shown that the Court would treat such a case as the present as an exception. In my opinion the learned judge was right in refusing relief to the husband by reason of his connivance, but he ought at the same time to have treated the wife as disentitled by reason of her continued adultery to maintain her claim to judicial separation and to have dismissed it.

I think the appeal succeeds and the only order that should be made is one dismissing the petition with costs against the husband.

The appeal must be allowed with costs.

DUKE L.J. Edward Everett, the petitioner in this case, prayed the dissolution of his marriage with the respondent Lily Sarah Everett on the ground of her adultery with the co-respondent Henry McCullum. The respondent admitted her adultery, but alleged that the petitioner was accessory to and had connived at, and, by his conduct, conduced to the adultery ; had condoned it, and had sanctioned its occurrence and continuance. She made counter charges of cruelty and claimed relief by judicial separation.

The learned judge at the trial, Lord Coleridge J., had evidence before him which in my opinion warranted affirmative findings upon all the respondent's allegations. He held that the petitioner had purposely brought about the cohabitation of the respondent and co-respondent, which began in 1915 and continued at the time of the trial, and that there was reasonable ground for apprehension of bodily harm to the respondent if she were required to cohabit with the petitioner. The

(1) 2 Curt. 210. (2) 13 P. D. 141.

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learned judge granted the prayer of the respondent for a judicial separation and gave her the custody of her four young children, two of whom were born before and two during the period of the alleged adultery. Against this decree the petitioner appeals.

The question upon which the result of the appeal depends is whether a woman living in an adulterous alliance, which has been brought about by the procurement of her husband, or with his consent, is able to maintain a suit for judicial separation. The matter was pressed upon as one of great concern to the parties by reason of the desire of each of them to have the custody of all or some of the children. It is obviously of more general importance, and the grant of a decree of judicial separation to a suitor avowedly living in adultery is unprecedented.

The jurisdiction of the Divorce Division in suits for judicial separation arises wholly under the Divorce and Matrimonial Causes Act, 1857, and, as was held in *Otway* v. *Otway* (1), is subject to the principles and rules which govern the proceedings of the Ecclesiastical Courts in like cases before the passing of that Act. If a judge of an Ecclesiastical Court could not have granted separation a mensa et thoro to the respondent in the present case she was not entitled to a decree such as has been made in her favour.

The appellant relied before us upon the declarations of the law made since the Divorce and Matrimonial Causes Act, 1857, by Sir Cresswell Cresswell as Judge Ordinary in a divorce suit of *Drummond* v. *Drummond* (2), and by this Court upon appeal from the Divorce Division in *Otway* v. *Otway*. (1) *Drummond* v. *Drummond* (2) was a case of a wife's petition for judicial separation on the ground of cruelty; cruelty was proved, and there was also proof against the petitioner of adultery. On the part of the wife, the petitioner in that case, it was urged that her alleged misconduct afforded no answer to the husband in respect of the offence proved against him. The Judge Ordinary made this reply (3): "That has no bearing on the

(1) 13 P. D. 141. (2) 30 L. J. (P. & M.) 177.
(3) 30 L. J. (P. & M.) 180, 181.

question, which is, whether a wife who has herself been guilty of adultery is in a position to be a petitioner in this court on account of a matrimonial offence committed by her husband. I think she is not." The learned judge treated the matter, it will be observed, not as one of recrimination between the parties, but as one which affected the competency of a guilty litigant, and he gave full effect to the submission reported to have been made by the Attorney-General, Sir R. Bethell, on behalf of the Queen's Proctor to the effect that "it was a settled rule of law in the Ecclesiastical Courts, that if a wife or husband who applied for a divorce à mensâ et thoro on the ground of adultery, was proved to have been guilty of adultery, both parties were driven from the judgment seat."

In *Otway* v. *Otway* (1) a decree of judicial separation on the ground of cruelty had been granted in the Divorce Division without discussion to a wife who had been guilty of adultery, and was set aside by the Court of Appeal for the same reasons in substance as were stated by Sir Cresswell Cresswell in *Drummond* v. *Drummond*. (2) Cotton L.J. said (3): "It was a departure from the principles which have been acted upon by the Ecclesiastical Courts, and which ought to be acted upon by the Court of Divorce." Those principles the Lord Justice summarized in the following words (3): "A wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce; and therefore on that ground she is not in a position to come to that Court to give her any relief as to any matrimonial offence which the husband may have committed."

Lopes L.J. in his concurring judgment used these words (4): "The principles upon which the Ecclesiastical Courts have acted in granting decrees for a divorce à mensâ et thoro—namely, that a wife or husband seeking such relief must come to the Court with a pure character, and must be free from any matrimonial misconduct."

(1) 13 P. D. 141.
(2) 30 L. J. (P. & M.) 177.
(3) 13 P. D. 150.
(4) 13 P. D. 152.

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Illustrations of the rule of the Ecclesiastical Courts to which reference was made by the Lords Justices in *Otway* v. *Otway* (1) are found in cases like *Forster* v. *Forster* (2), where Lord Stowell held that a spouse guilty of a matrimonial offence was not a competent suitor for relief by separation a mensa et thoro; *Proctor* v. *Proctor* (3), where Lord Stowell held that an Ecclesiastical Court had no power to grant a decree of separation to a guilty applicant; and *Lovering* v. *Lovering* (4), where the same eminent judge laid it down broadly that in an Ecclesiastical Court a man seeking relief in a matrimonial cause "must come with pure hands himself." The respondent in this present case relies upon the conclusion, at which Lord Coleridge J. arrived at the trial, that adultery procured by the petitioner was not available to him in a matrimonial suit between him and the respondent. A distinction is insisted upon as separating this case from all cases where there was misconduct such as could be relied upon by the party who alleged it. It was sought to limit the disability of suitors in Ecclesiastical Courts on the ground of par delictum to cases where the party in whose interests the disability would operate is not involved in the guilt of the offence out of which the disability arises. Counsel likened the present case to that of a condoned offence, not revived, which cannot be set up by a party not guilty who in the past had condoned the transgression of the opposing party, and claimed that a discretion might be exercised in favour of the respondent on the footing that some discretionary power of relief exists in suits for judicial separation where there has been condonation. No case of judicial separation when the alleged discretionary power had been exercised in respect of guilty conduct brought about by the defendant was cited to us, and so far as I know there is no such case. The terms in which by s. 31 of the Divorce and Matrimonial Causes Act, 1857, a discretionary power is given in suits for dissolution of marriage, seem to me to indicate an opinion on the part of the authors of that statute that the power in question did not exist.

(1) 13 P. D. 141.
(2) (1790) 1 Hagg. Cons. 144.
(3) (1819) 2 Hagg. Cons. 292.
(4) 3 Hagg. Ec. 85, 87.

The argument in favour of the existence of a discretionary power of relief in circumstances such as those of the present case was based partly upon the common law principle that a suitor may not take advantage of his own wrong; partly upon dicta to which I will presently refer; and, in a considerable measure, upon the reasoning and conclusions of the learned judge of the Consistory Court of London, Dr. Lushington, in a suit of *Anichini* v. *Anichini* (1) heard in 1839, the judgment in which has been accepted as authoritative since the passing of the Act of 1857. The question in *Anichini* v. *Anichini* (1) was whether a decree for separation might be granted to a suitor notwithstanding a past offence of adultery which had been condoned. Lord Stowell in an older case of *Beeby* v. *Beeby* (2) had expressed in 1799 an opinion that condonation did not suffice to make a party whose offence had been condoned rectus in curia, but that upon proof of "condonation, cohabitation and reformation" the offence might become "an obsolete fact" to which the Court would not give any operative effect. This appeared to point to a discretionary power. In *Anichini* v. *Anichini* (1), however, the learned judge of the Consistory Court declared the effect of condonation to be that the forgiven offender became rectus et integer—liable only to have his past transgression revived by subsequent transgression, and the learned judge granted a decree of divorce a mensa et thoro accordingly. He did not profess to exercise a discretion; he treated the decree as the right of the party. Lord Stowell had suggested in *Chambers* v. *Chambers* (3), heard before him in the Consistory Court of London, a doubt whether the rule of the Court as to a by-gone offence was an absolute rule in cases of cruelty. The learned judge used these words: "If the wife was the prior petitioner in a suit of cruelty, I do not know that she would be barred by a recrimination of that species" (adultery); "for the consideration would be very different: the Court might not oblige her to cohabitation, which would be dangerous." Those words refer primarily to a restitution

(1) 2 Curt. 210. (2) 1 Hagg. Ec. 789.
(3) (1810) 1 Hagg. Cons. 439, 452.

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suit, and would not necessarily help the present respondent if they stood unquestioned, but in view of the opinion expressed in this court in *Otway* v. *Otway* (1) they cannot be thought to have substantial importance in this discussion. Moreover, in *Proctor* v. *Proctor* (2) Lord Stowell in 1819 laid down the general rule quite clearly in an inquiry with regard to adultery committed after the separation of the spouse and under circumstances of extenuation. "It is a par delictum," he said, "with any other act of adultery, that may have taken place during any former period of the marriage contract—of course it carries with it all the disability which an adultery creates of obtaining an authorized separation." The judgment of the Court of Delegates, the final Court of Appeal in Ecclesiastical Causes, in the case of *Brisco* v. *Brisco* (3) is of like effect.

The question whether a wife who had been guilty of adultery might under some circumstances be a competent suitor for a decree of judicial separation was again raised by Sir J. Hannen in 1873 in *Grossi* v. *Grossi* (4) in some observations well calculated to secure serious consideration for the questions involved in the present case. "It has been contended," Hannen J. said, "that in no case can a wife who has been guilty of adultery obtain a decree of judicial separation on the ground of her husband's cruelty. During the argument I expressed my unwillingness to come to such a conclusion. Many cases might be suggested in which a very serious wrong would remain unredressed if it were impossible for a wife in such a state of things to obtain the protection of this Court. A profligate husband might, by the grossness of his conduct, lead his wife to infidelity, and might then, if so disposed, make use of all the means in his power to torture her morally and make her life a burden to her and inflict serious injury upon her health, without committing any actual assault for which she could obtain relief in another court. I am unwilling to say, until it becomes necessary, that in no such case has this Court power to grant redress. It was urged that this Court

(1) 13 P. D. 141.
(2) 2 Hagg. Cons. 292, 301.
(3) (1824) 2 Add. 259.
(4) L. R. 3 P. & M. 118, 119.

never has granted such relief to a wife guilty of adultery. That may be so, but it has not been determined that in no case can the Court do so." In the case now before this Court the inquiry suggested by Hannen J. arises only with regard to a wife living in adultery at the time of the suit. None of the considerations to which the learned President adverted are here involved—and his observations show no trace of an opinion that a spouse presently living in adultery was a possible claimant for judicial relief.

One other dictum which may be thought to bear upon the question of existence of a discretionary power is that of Jeune P. in *Gooch* v. *Gooch* (1)—" in cases of judicial separation condonation gives to the Court a discretion to grant the relief sought notwithstanding the adultery of the petitioner." The statement is founded upon the decision in *Anichini* v. *Anichini* (2), when the Court did not in fact purport to exercise a discretionary power. Lord St. Heliers also declares expressly, in the same judgment, that in a suit for judicial separation the adultery of a petitioner is a bar to the obtaining of relief " unless its effect be in some way neutralized." (3)

After examination of the relevant cases I am satisfied there is no judicial authority for the proposition that an Ecclesiastical Court could as matter of discretion grant relief to a suitor who at the time of the suit was guilty of adultery. Further, and apart from express decision, the contention is contrary to the whole tenor of the principles of Ecclesiastical law as it was administered in English Courts. The reported cases, taking them in the view least adverse to the respondent's argument, show only that an offence which had been purged or expiated, or otherwise blotted out and never revived, could not afterwards be raised to the prejudice of the some-time offender. But they are definitely founded upon knowledge that an Ecclesiastical Court could give no relief to a litigant who came before it under the guilt of an admitted existing offence. This certainty pervades all the works of authority of which I am aware. Oughton, in the Ordo Judiciorum,

(1) [1893] P. 99, 105. (2) 2 Curt. 210.
(3) [1893] P. 103.

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states in unqualified terms that the defendant in a suit for separation who proves the complainant to have committed adultery is absolved from the suit of the complainant. He was of opinion further (1) that a guilty husband or wife could even be decreed to cohabit with a guilty spouse, but in *Hope* v. *Hope* (2) this was held not to be part of the Ecclesiastical law of England. Ayliffe, in the Parergon, gives proper weight to the fact, which is apt to be overlooked, that the main duty of the spiritual tribunals in their corrective jurisdiction, as well as in the administration of their civil powers, was to repress those moral offences in respect of which they had authority. Writing with regard to adultery he states (3) that "the punishment of adultery in a layman is excommunication," and that "the second punishment . . . . is a thoral separation." Discussing the criminal and civil powers of the Courts as parts of one system of jurisprudence he enumerates the persons who under that system were competent to be actors, and among persons who are forbidden to be "accusers" he specifies "adulterers." (4) It appears also that at common law an excommunicated person so long as he remained excommunicate was incompetent to prosecute any legal claim: *Trollop's Case.* (5) Nor did the restraint upon the Ecclesiastical jurisdiction depend only on the general effect of the principle that suitors for relief in spiritual courts must come "with pure hands." Canons 107 and 108 of the Canons of 1603, which were mandatory to all Ecclesiastical judges in England, provide that "in all sentences of divorce and separation à mensâ et thoro there shall be a caution and restraint inserted in the Act of the sentence that the parties so separated shall live chastely and continently . . . . and the said sentence shall not be pronounced until the party or parties requiring the same shall have given full and sufficient caution and security to the Court that they will not in any way break or transgress the said restraint." This caution might have been by oath or by bond. A decree contrary to

(1) Tit. 216.
(2) 1 Sw. & Tr. 94.
(3) Ayliffe's Parergon, 47, 48.
(4) Ayliffe's Parergon, 24.
(5) (1608) 8 Rep. 68*a*.

these Canons was ipso facto void, and severe personal penalties were enforceable against an Ecclesiastical judge who failed to observe their requirements.

That the present respondent could have obtained in an Ecclesiastical Court the decree which she obtained in the Divorce Division is manifestly impossible, and I am of opinion that this decree cannot be sustained, and that this appeal succeeds.

WARRINGTON L.J. Mr. Justice Eve has asked me to say that he has read and concurs in our judgments.

Appeal allowed.

Solicitors for appellant: *T. H. Horwood & Co.*
Solicitors for respondent: *Jerome & Co.*

G. A. S.

(IN PRIZE.)

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[1915, No. 502.]

Prize Court—Contraband—Misdescription of Cargo—False Papers—Vessel under Charter—Shipowner's absence of Knowledge.

The owner of a Norwegian vessel chartered her to an American firm for a single voyage from New York to Scandinavian ports. The vessel loaded a miscellaneous cargo, including some aluminium and a small quantity of rubber which was manifested as gum. The aluminium and rubber were seized as prize and condemned as contraband destined for Germany.

In an action to condemn the vessel on the grounds that she was carrying contraband and sailing with "false papers" by reason of the misdescription of the rubber as gum:—

Held, that, even assuming the charterers knew that the rubber was misdescribed for the purpose of sending it on to Germany, inasmuch as it had not been shown that either the shipowner or the master had any knowledge of the misdescription or were aware that any of the cargo had an enemy destination, the shipowner was not affected with the charterers' knowledge, and the ship was not liable to condemnation.

The dictum of Sir Samuel Evans in *The Hakan* [1916] P 266, that

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it would be placing a premium on contraband trading to allow owners who have entered into time charter contracts to protect themselves by such arrangements, does not apply to the case where an owner charters his ship for a single voyage from one neutral port to another, and, without his knowledge, the charterer consigns a small portion of the cargo to an enemy country.

ACTION for the condemnation of the steamship *Ran* on the ground that the cargo she was carrying at the time of her seizure was as to more than one-half contraband, and further or alternatively on the ground that she was carrying false papers by reason of the misdescription of part of the cargo, namely, parcels of rubber which in the ship's papers were falsely described as gum.

The *Ran* was a Norwegian steamship of 3022 tons gross owned by one Jacob Olsen, a Norwegian subject carrying on business at Bergen. Under the terms of a charterparty dated October 14, 1914, the *Ran* was chartered to Barber & Co., shipowners, of New York, to be employed in carrying merchandise in lawful trades for a voyage from the United States to Scandinavia between Bergen and Malmo, including Copenhagen. On November 5 she was delivered to Barber & Co. and loaded a miscellaneous cargo at New York for Scandinavian ports. Among the goods were some parcels of copper, 33 cases of crude rubber, and 2010 bundles of aluminium ingots. There were also 357 cases described as gum shipped by the firm of Maurer & Co., of New York, and consigned to Ullman & Co., at Copenhagen. When the *Ran* arrived at Liverpool its cargo was examined, and the cases described as gum were found to contain rubber. The ship and various parcels of cargo were seized as prize on December 8, 1914. The copper was eventually released, but the aluminium and the misdescribed rubber were condemned as contraband destined for Germany by a judgment of the Prize Court dated October 12, 1917. The Crown now claimed the condemnation of the vessel.

C. W. Lilley (with him *Sir Gordon Hewart A.-G.*) for the Procurator-General.

The Crown is entitled to a decree of condemnation against

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the vessel on the ground that she was privy to the carrying of contraband with a false description. Although the shipowner may not have had personal knowledge of the fraud he parted with the control of his ship and left her for the charterers to put on board whatever cargo they chose. The Crown's only remedy in these cases is against the ship, and it would defeat the right of the Crown altogether if the shipowner could claim the release of his ship on the ground that he personally had no knowledge of the misdescription, and had chartered her to someone else and taken all reasonable precautions. On the facts the charterers had knowledge of the misdescription, and its consequences ought to be visited on the ship. See the observations of Sir Samuel Evans in *The Hakan.* (1)

Sir Erle Richards K.C. (*Balloch* with him) for the shipowner. The ship can only be condemned if there is proof that the owner knew that the rubber was contraband destined for the enemy. False description alone is not enough; it is merely evidence on which the Court could infer knowledge if other facts in the case supported it. The evidence is all one way, and it is not even suggested on the part of the Crown that the shipowner personally had any knowledge of the misdescription or the contraband destination of the consignment. There is no case in which a neutral ship has been condemned merely for carrying "false papers" of this character. The owner cannot be affected by the act of the charterers, certainly where the charter is for a particular voyage only, a limitation which distinguishes this case from *The Hakan.* (1) But the President's dictum in *The Hakan* (1) was unnecessary to the decision, and Lord Parker in the Privy Council expressly left the question open. (2) There is no other authority for the Crown's proposition. International law has not been extended so as to render the shipowner liable for the acts of charterers. Knowledge on the part of the master of the misdescription and enemy destination of a portion of the cargo might stand on a different footing,

(1) [1916] P. 266, 283. (2) [1918] A. C. 148.

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because the master would be the owner's agent, but the facts were that the master, being anxious about the destination of the goods on the contraband list, went to the charterers' office and satisfied himself that all of them had a neutral destination. It was impossible for the master to know that the neutral consignees of some of the parcels intended to forward them to Germany. There are no grounds for the condemnation of the ship, and the bail deposited to secure her release, 19,500*l.*, should be discharged.

C. W. Lilley replied.

THE PRESIDENT (LORD STERNDALE). In this case the Crown is asking for condemnation of the steamship *Ran* on the ground that she had been carrying contraband—and by that I mean of course a cargo with a contraband or enemy destination and not merely a cargo which is of that description—and carrying contraband falsely described to the knowledge of the owner, either to his individual knowledge, or to the knowledge of the master, who was his agent, or to the knowledge of the charterer, whose knowledge, if proved, it is contended would affect the owner just as though it were the knowledge of the owner himself.

The *Ran* was under charter to a firm of Barber & Co. She was under charter for one trip, a trans-Atlantic trip from the other side of the Atlantic to ports which are specified in this way: "For a trans-Atlantic trip over from the United States to Scandinavia between Bergen and Malmo, including Copenhagen, and time occupied to be a minimum of forty days. . . . . The charterers shall pay for the use and hire of the said vessel, at 11*s.* 6*d.* per ton on total deadweight capacity of ship, including bunkers, on Lloyd's system of freeboard per calendar month commencing on and from the day of her delivery aforesaid, and at or after the same rate for any part of a month," and so on. Payment was to be so much per ton per calendar month; therefore the payment was to be by time. But it was not of the nature of some time charters, in which the use of the ship is given to the time charterer either with a limit only as to the ports to which

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the ship is to go or without any limit at all; and there was a clause which provided that the charter was not to be a demise of the ship—obviously it was not when the charter-party is read—but it is really an agreement for the use of the ship for the voyage I have mentioned.

The vessel carried a large and various cargo of some three thousand odd tons. In one of the telegrams sent from the agent in New York to the owner in Norway it was described in this way: "*Ran.* Cargo consists of grease, lubricating oil, wax, oilcake, meal, corn-oil, copper and gum." It was a cargo, therefore, that contained on the face of it several articles which are either absolute or conditional contraband. It was rather early in the war that the voyage took place, and many things which afterwards became absolute contraband were, at that time, only conditional or not conditional at all. But the vessel carried such things as grease, lubricating oil, meal, corn and copper, some of which at any rate were either conditional or absolute contraband at the time, provided they were going to an enemy country. She also carried what was described as gum, and this telegram was sent with information to the shipowner of what the cargo was. In answer to that the following telegram was sent to the owner's agents in New York: "*Ran.* Remember name billadings fear risk capture your composition cargo understand English authorities compelled *Bergensfjord* discharge Kirkwall gum and parcels to order." Therefore in consequence of the *Bergensfjord* having been intercepted they thought probably this vessel would be detained. She was to go upon a voyage which would take her in the first instance to Liverpool, and at Liverpool she would be examined. That was pointed out to the master by a letter written to him by the charterers upon November 13, which was the date of sailing. They said: "We expect your steamer to be loaded in time to proceed to sea this afternoon about 4 o'clock, for which time pilot and tugs have been ordered. Your ports of discharge are Liverpool, Eng., Gothenburg and Malmo, Sweden, in the order named." Then it gives the name of the agents, and it goes on: "Our Liverpool agents,

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Messrs. J. Barnett & Co., 19, James Street, have full authority to act for us in all contingencies, and any orders they may give you may be considered as coming from us, and you may act on them without further reference to us. Furthermore, it will be in order for you to communicate with Messrs. Barnett & Co. in any contingency. As your cargo will be examined while you are at Liverpool by the British authorities, we shall be glad if you will see that you obtain a proper release from the authorities there so that you will not be compelled to return to any other port later on should you meet any British warships in the North Sea." Then it proceeds to give him instructions as to coal, and it goes on: "A complete set of documents will be placed on board your steamer before sailing from here, and with your documents we will hand you affidavits from the shippers, giving the names of all consignees which may not appear on the original bills of lading." There had previously been some communication in which it was pointed out that the bills of lading ought to contain the names of the consignees, or there would be trouble because of the difficulties that might arise in consequence of the bills of lading being to order, as one of the telegrams pointed out there had been in the case of the *Bergensfjord*.

The trouble arises in respect of a few parcels of rubber consigned to a firm of Ullman & Co. There were about fourteen cases containing the rubber, and I am told that is a matter of about thirteen tons. The rubber was described as gum both in the manifest and in the bills of lading and in what was called the "statement"—a statement for the benefit of the Customs authorities in New York. It was described by the shippers, E. D. Maurer & Co., as "crude gum." It was in fact rubber; and it was condemned by the late President on October 12, 1917, on the ground that it was contraband intended for Germany, that Ullman & Co. were intending to send it to Germany, and that it was falsely described as gum. I have read the judgment of the late President, and on the facts there stated it seems to me there can be no question that Messrs. Ullman & Co. were intending

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to send this rubber to Germany, and that it was described as gum for the purpose of concealing the fact that it was contraband rubber which was going to Germany. The learned President said: "The Crown relied also upon the fact that the goods on the s.s. *Tyr* and the *Ran* were shipped as gum. How this came about appears by the letters and cablegrams. It was not suggested by Ullman but he acquiesced in it"—those cablegrams have not been read to me in this case, but I take it they are cablegrams passing between Messrs. Ullman & Co. and another person—"I dealt with this matter in *The Kim* (1) and *The Fridland* (1) on the evidence which was then before the Court. Some additional evidence has been disclosed in the present cases." The President had held that the description of rubber as gum, in spite of the affidavit filed to show that that was an ordinary description, was not a proper description, and was a false description of a consignment of rubber, and he condemned that portion of the cargo. With that judgment I have no right, nor have I any wish, to quarrel. It seems to me to be quite right and I accept it.

Then there arises the question: What is the position as far as regards the shipowner? The shipowner's information as far as I know, of the cargo, was contained in the telegram that I have read, and I think in a letter which is very much to the same effect. It certainly showed him that there were parcels of goods upon the ship which were upon the list of contraband articles if they were going to an enemy destination. But they did not show him that they were in fact going to such a destination, and with regard to the vast majority of parcels in this case they were not. To take an instance, one parcel which was described as crude rubber went through to a neutral destination and was not contraband at all, and I think that was the case with regard to some of the other parcels, such as copper and other things which were on board. I see nothing whatever to show any knowledge upon the part of the owner individually or any intention on his part that his vessel should be used for carrying contraband goods.

(1) [1915] P. 215, 264.

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I now come to the master. I am inclined to think, without deciding it, that the master, being still the agent of the owner under the charter, the ship not being demised to the charterers by the charter, would affect the owner with any knowledge that he had of any improper use of the vessel. The master has filed an affidavit in which he says that he saw that copper and aluminium formed part of the cargo, and he went, therefore, to the Norwegian consul to find out whether they were contraband, and found that they were, and he then called at the charterer's office and satisfied himself that none of the cargo was destined for any country at war with Great Britain. He says he was also informed that the charterers were getting affidavits from the shippers viséd by the British consul at New York, giving the names of all the consignees which did not appear in the original bills of lading and stating that the cargo was being consigned to Sweden, and that the affidavits were handed to him before he sailed with a letter of instructions, the contents of which, so far as they are material, I have already read. He deals with the question of the description of rubber as gum in the last two paragraphs of his affidavit. They are rather curiously worded, but I think the effect of it is this: "These goods were packed in cases; I did not see what was inside, and I saw no reason to doubt when they were described as gum that they properly answered that description; but even if I had known they were rubber I should not have thought there was anything wrong, because gum and rubber are interchangeable names to me as a Norwegian; I know that in my language rubber is sometimes called gum, and whether it was called rubber or whether it was called gum I should not have taken any notice." I think that is right, and that it accurately represents the state of mind of the master. No doubt has been thrown upon the question of his going to the Norwegian consul and getting the information that he did as to whether the cargo was contraband or what was going to be done with it, and there is not to my mind any evidence whatever to show that the master had any knowledge that there was an intention to send these parcels to an enemy

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country, any more than the other parcels of copper or aluminium or anything else on the contraband list which in fact were not going to enemy countries and did not go there. I think there is nothing whatever against the master in this case, and indeed, so far as the question of the knowledge of the owner and the master has been gone into, counsel for the Crown has not seriously contended that they had any real knowledge of the matter.

I now come to what is the somewhat difficult and important matter: Had the charterers, Messrs. Barber & Co., information and knowledge that these goods were of contraband nature going to an enemy country; and, if they had, does that knowledge affect the owners? With regard to Barber & Co. quite a different case is raised from that which is made against the owner and the master. It is based very largely upon two affidavits by the shipper. In the first place it is said that Barber & Co. ought anyhow to have known that the description of rubber as gum was a misdescription, and that it must be concluded that they did know, because the shipper says that he sent to them invoices on the face of which the goods appeared described as rubber, which he intended to be attached to the ship's manifest; that Barber & Co. received the invoices and did not attach them to the manifest, because they knew that rubber was sold under the name of gum and they were not going to give it away. Of course it does strike one as a little odd if Maurer & Co., the shippers, were describing this as gum and at the same time sending forward invoices which showed that it was rubber for the purpose of being attached to the manifest, that Barber & Co. should have done anything else, because Maurer & Co. were the real people concerned with the matter; and the only suggestion that could be made is that Maurer & Co. were perfectly innocent and meant no deception, but Barber & Co. had by some arrangement between themselves and the shippers intended such a deception. If that be not the suggestion it is difficult to see why Maurer & Co. should have wanted to attach documents to show it was rubber, and Barber & Co. should have held them back. That

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is really the strongest part of the case against Messrs. Barber & Co., and I confess it is not very convincing to my mind. It is to be remembered that Barber & Co. were dealing with the whole of this cargo, and it is rather difficult to see why, when they were dealing straightforwardly with what was much the largest portion of the cargo, they should have gone out of their way with regard to this small portion to do something which was deceptive and dishonest.

They say that they had not the opportunity of seeing this affidavit of Messrs. Maurer & Co. in time to answer it before the hearing of this case, and that is why they did not answer that allegation.

It is also alleged in Messrs. Maurer & Co.'s affidavit that it was the shipping company—which I think would include Barber & Co. under the circumstances—who had requested that the rubber should be shipped as gum or otherwise they would not accept it. That is categorically and entirely denied by Mr. MacKay, who is an influential person and vice-president of Messrs. Barber & Co. The passage in the affidavit was this: "This shipping as gum was suggested by the steamship company and was the only way they would accept the shipment"—the suggestion I suppose being that they would not accept it as rubber and described it as gum in order that they might avoid having their ship detained and searched. Now, as pointed out, there is no question that the ship would be searched, or at any rate that there would be some examination made, because she was going to call at Liverpool and she carried on the face of her manifest such articles as copper, food stuffs and aluminium—and therefore certainly some examination of her would be made at Liverpool.

It is contended that there is more case against Messrs. Barber & Co. than there is against the master, and if it were necessary to decide it I should probably give Messrs. Barber & Co. an opportunity of dealing with the allegation, but I may say that even on the evidence as it at present stands I am not convinced that Messrs. Barber & Co. had knowledge that these goods were misdescribed for the purpose of being

sent to Germany and were intended to be sent to Germany. I do not think, however, that it is necessary to decide it, because I am of opinion that even if they did know, under the circumstances of this case their knowledge would not affect the owner so as to make the owner's ship liable to condemnation. There is no case that has been cited to me in which the knowledge of the charterer that some portion of the cargo is contraband intended for an enemy destination has been held sufficient to condemn the ship as against the owner and to be equivalent really to the owner's own knowledge. It is to be remembered that knowledge of the misdescription is not of itself enough; there must be a knowledge of the misdescription under such circumstances as to lead to the inference that the person who knew of the misdescription also knew of the contraband nature and contraband destination of the goods. I can find no case in which such knowledge on the part of a charterer, even if it existed, has been held sufficient to justify the condemnation of the ship. The strongest passage to which I was referred and in fact the only passage, I think, of any importance in which the relations of charterer and owner with regard to this matter has been laid down, is in the decision of the late President in *The Hakan* (1), where he said: "I should have no hesitation in drawing the inference that they," that is the owners, "did know." It is quite obvious therefore that that decided the case and that anything that followed was not necessary for the decision; but at the same time there was a statement of a principle by which, in my opinion, I ought to be bound if it fitted the circumstances of this case. The learned President said: "Moreover, if owners, in time of war, and in waters favourable to contraband trading, enter into time charter contracts, it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charterparties and sheltering themselves behind a screen of ignorance of their own deliberate construction. A vessel's immunity or penal responsibility ought not to depend upon such arrangements." Now, the *Hakan* was a small

(1) [1916] P. 266, 283.

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vessel—not ocean going—she was chartered for the purpose of traffic in the Baltic, and was carrying contraband articles to Lübeck, and it was to that circumstance that the learned President was alluding when he said "in waters favourable to contraband trading." I do not think, however, that the principle he laid down is confined to that, and I think that he meant to say that if the result of the charter is to take the disposal of the vessel out of the hands of the owner and leave it to the charterer to do what he likes with her, then the owner cannot escape the consequences of what the charterer does, because he has chosen to give the control of the vessel over to the charterers. I do not think that the learned President had under his consideration a charter of this description. It is to be noted that he said "enter into time charter contracts," and I think that what was in his mind was a charter by which the owner really left it in the hands of the charterer to do what he liked with the vessel so long as he paid his hire. That does not seem to be applicable to a charter of the description I have before me here. As I have pointed out this is a charter for one trip to neutral ports. It is quite true that they are ports that are not very far from the enemy country, but it is to ports in the country or in the adjoining country to which the vessel belonged. It is a charter for one trans-Atlantic trip of a Norwegian vessel to Scandinavian ports, and I do not think that that constitutes such a handing over and divestment of responsibility on the part of the owner as was under the contemplation of the late President in the passage which I have read.

The Hakan (1) went to the Privy Council. (2) The importance of the facts which I have read was not dealt with by their Lordships except possibly in a suggestion or a reservation in the judgment. Lord Parker, delivering their Lordships' opinion, said: "There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo." I do not think that that was meant to affect the owner with the knowledge of the charterer, even if it existed,

(1) [1916] P. 266. (2) [1918] A. C. 148, 155.

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in the case of a charter of this description. No doubt every charter puts the ship into the control of the charterer to a certain extent, but if an owner charters his ship for one specific voyage from neutral port to neutral port, and the objects of the charter can be perfectly well carried out, and, as in this case, the vast majority of the cargo was carried in a trade which is perfectly legitimate from any point of view, but certainly from the contraband point of view, because the goods were not to be delivered to an enemy country, he cannot be condemned to the loss of his whole ship because the charterer on a voyage of that kind against the owner's wish and without the owner's knowledge, consigns some minute portion of that cargo to an enemy country.

I, therefore, am of opinion that the Crown have not made out their case for condemnation of the vessel, and there must be an order for the discharge of the bail. I think, however, it was a perfectly proper case to bring before the Court, and I shall make no order as to costs.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitors for the claimants : *Botterell & Roche.*

E. C. T.

(IN PRIZE.)

1919
July 18, 21.

IN THE MATTER OF THE ANICHAB AND OTHER VESSELS AND CRAFT.

[1918, No. 1817.]

Prize Court—Enemy Property—Subjects of Maritime Prize—Lighters and Craft seized on Land—"Hot Pursuit"—Seizures by Non-commissioned Captors—Indemnities—IVth Hague Convention, art. 53—*XIth Hague Convention, art.* 3.

A number of enemy-owned tugs, lighters, and other craft and material belonging to the German Woermann Line and others, were seized as prize in the course of the campaign in German South-West Africa. Some of the seizures took place when the ports of Swakopmund and Luderitz-bucht were occupied by the British forces; but a number of the craft, on the near approach of the troops, were moved up country by the

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Germans to avoid capture, and were found some months later at Omaruru and Otavi, distant respectively 148 and 310 miles from the coast, when these places were captured by the military forces.

By art. 53 of the IVth Hague Convention, 1907, "all appliances, whether on lands, at sea or in the air, adapted for the transmission of news or for the transport of persons or goods apart from cases governed by maritime law, depôts of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored, and indemnities for them regulated at the peace":—

Held, (*a*) that the seizures made at Swakopmund and Luderitzbucht, whether made by commissioned officers or anyone else acting under the authority of the Crown, were good and lawful prize and subject to condemnation; (*b*) that the craft and other material seized at Omaruru and Otavi could not, on the evidence, be regarded as cases of "hot pursuit" of property which the enemy had succeeded in landing to avoid capture at sea or in port, and must be treated as seizures on land by land forces in land operations, and, therefore, not the subject of maritime prize; but that (*c*), although the German claimants were entitled to the release of the property seized at Omaruru and Otavi, inasmuch as under the IVth Hague Convention indemnities, if any, were to be settled "at the peace" and therefore by diplomatic action, and the case was a proper one to bring before the Prize Court, the property would be released without either indemnity, damages or costs.

ACTION for the condemnation of a number of tugs, lighters and other craft and material as enemy property.

The property seized, which for the most part belonged to the German Woermann Line, was seized at various places in the course of the campaign in German South-West Africa. A claim was entered on behalf of the Woermann Line for the release of all the craft and material owned by them on the ground that it was not liable to condemnation as prize.

The facts relating to the various seizures are summarized in the headnote and are fully set out in the judgment.

Wylie for the Procurator-General. The seizures at Swakopmund and Luderitzbucht are valid as seizures of enemy property in port, and those at Omaruru and Otavi as seizures of enemy property, the subject of maritime prize, taken up country to avoid capture by the pursuing belligerent. An enemy cannot, by carrying them inland, remove from the liability to capture goods which are prima facie liable to seizure: e.g., he cannot by selling them to a neutral protect them from condemnation: *The Bawean*. (1) Prize jurisdiction is not

(1) [1918] P. 58.

limited to seizures at sea or in port, but applies to goods brought ashore to avoid seizure : *Lindo* v. *Rodney*. (1) See also Story's Principles and Practice of Prize Courts, Pratt's ed., p. 29, and *The Roumanian*. (2) None of these craft were "small boats employed in local trade," and they are not entitled to the protection of the XIth Hague Convention : *Procurator in Egypt* v. *Deutsches Kohlen Depôt*. (3)

Stuart Bevan K.C. (*Darby* with him) for the claimants. The craft and other goods seized above high water mark and up country were not the subject of maritime seizure. Even assuming they could be called "war material," they were personal property privately owned, and as such, under the IVth Hague Convention, could only be seized subject to indemnity.

There is no evidence that any of the seizures were made in the course of any naval operations. Military seizures are limited to booty, which, subject to the extension provided by s. 34 of the Naval Prize Act, 1864 (4), can only be seized on the field of battle. Even assuming there were joint naval and military operations, private property ashore is not liable to seizure and *The Roumanian* (2) is not an authority for that proposition. If the judgment means that naval forces can seize anything on land it would involve a breach of the IVth Hague Convention. This was not a case of "hot pursuit" of maritime property run ashore to avoid capture at sea. Two of the craft taken at Luderitzbucht had been beached for repairs before the outbreak of war, and as regards the craft seized at Omaruru and Otavi, although they had been moved up country from the seaports, they had been lying on private property many months before they were captured. Further, by the terms of surrender granted to the German South-West African forces in July, 1915, the Crown allowed

(1) (1782) 2 Doug. 612 *n*.
(2) [1916] 1 A. C. 124.
(3) [1919] A. C. 291.
(4) Naval Prize Act, 1864, s. 34 : "Where, in an expedition of any of Her Majesty's naval or naval and military forces against a fortress or possession on land, goods belonging to the state of the enemy or to a public trading company of the enemy exercising powers of government are taken in the fortress or possession . . . a Prize Court shall have jurisdiction as to the goods so taken."

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private trading companies to resume their trade, and some of the seizures at Omaruru and Otavi, which were effected by railway officials and not by commissioned captors, appear to have been made after that date.

[THE PRESIDENT: I do not see how the cessation of hostilities between sections of the belligerents can take away the right of the Crown to seize enemy property provided it is the subject of maritime prize.]

The surrender operated as a contract, and the Crown would be doing violence to the terms of the contract, express or implied, if it asserted belligerent rights over private property after that date.

The craft seized afloat at Swakopmund and Luderitzbucht were very much smaller than those held in *Procurator in Egypt* v. *Deutsches Kohlen Depot* (1) not to be "small boats employed in local trade," and that case, therefore, is distinguishable. The claimants are either entitled to an indemnity under the IVth Hague Convention or to damages and costs for wrongful seizure.

Wylie in reply. The dates of seizure relied on by the Crown as regards the property seized at Omaruru and Otavi are the dates when the Union troops advanced and these places were taken and occupied. Thereafter maritime property was subject to condemnation as prize and the claimants had no right to dispose of their craft or otherwise deal with them. It is immaterial that some of the seizures may have been made by railway officials and not by commissioned captors, and that the naval forces may not have co-operated in the expedition. See Rothery's Prize Droits, p. 126, and *The Marie Anne* (2) there cited. See also *The Thalia*. (3) Sect. 34 of the Naval Prize Act, 1864, only applies to joint expeditions and has no general application. Even assuming some of the property may not have been properly seizable as prize, the Prize Court has no jurisdiction to award indemnities under the IVth Hague Convention; that is a matter for diplomatic action "at the peace."

(1) [1919] A. C. 291. (2) (1803) Unreported.
(3) (1905) 2 Rus. & Jap. P. C. 116.

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THE PRESIDENT (LORD STERNDALE). This is a curious case, and raises questions which now first come before me. The Crown asks for condemnation of some tugs, lighters, rafts and other property, including buoys and some rope fenders, belonging to the Woermann Line, also some craft supposed to be the property of the German Government, and craft the property of other persons. Most of the craft and articles had been at the port of Swakopmund, which is a little north of Walfisch Bay, or at Luderitzbucht, which is considerably south of that place. When they were seized, some of them at any rate were at a place called Omaruru, which is about 148 miles from the coast, and others were at Otavi, which is about 310 miles from the coast.

The first question that arises is in respect of the tugs and other craft which were still at or about these ports at the time when occupation was taken of them by the South African forces. Possession was taken during the hostilities which took place between the Government of the Union of South Africa and the Government of German South-West Africa, being part of the general hostilities existing between the British and German Governments at that time. The incidents which preceded the taking possession of these goods are not fully detailed in the evidence that I have before me; but I gather that one of these ports, at any rate, had been bombarded by a British cruiser, and I take it that a portion of the British forces was conveyed on transports to these ports. How the rest of the forces arrived at the various spots I have not been told. I think Luderitzbucht was occupied somewhere about September, 1914, and Swakopmund in January, 1915. At that time there were found some of the tugs and craft which had been afloat in these two harbours. Some of the craft were afloat, some were beached below high water, others of the craft were beached above high water. In some cases they had been beached for the purpose of repairs, or because they were not required at the moment; and in some cases I think they had been beached in consequence of the approach of the Union forces, and in order that they might be to that extent safe. When the Union forces took possession of these ports,

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I am satisfied that they also took possession of all these craft, which were then either afloat or beached above or below the high water line, and that, therefore, there was a seizure at that time.

The first question that arises is whether those craft are the subject of maritime prize. I cannot have any doubt that they are, subject to the question of the Hague Convention, with which I shall deal hereafter. It does not seem to me to matter in the least whether the vessels or the craft—because some of these could hardly be called vessels—which are being used for navigation upon the seas, not the high seas necessarily, but upon the seas, either coastwise or on the high seas, were at the moment in the water or on the beach. It does not seem to me to matter whether the possession of them was taken by somebody who was a commissioned officer of His Majesty's Navy, or somebody who was operating under the authority of the Crown for the purpose of hostilities which involves taking possession of enemy property at sea. They are craft which were intended for navigation, either coastwise or on the high sea; and, therefore, the belligerent is entitled to seize them. The fact that they have been beached either above or below high water can no more defeat his right to seize them than in the case of goods which have come across the sea and have been put into warehouses in the port to which they were destined, or, like the oil in *The Roumanian* (1), pumped into tanks which are within the ambit of the port. I do not know whether these places, Swakopmund or Luderitzbucht, have any defined limits as a port or not; but certainly for the purposes of prize, if it be a question of being within the port, I should say that all these craft, beached as they were, were just as much within the port, and, therefore, just as much seizable as the craft which were afloat. It does not seem to me that any question can arise as to them, except the question which is raised under the XIth Hague Convention, art. 3, which exempts from capture "vessels employed exclusively in coast fisheries, or small boats employed in local trade." These are certainly not "vessels employed exclusively in

(1) [1916] 1 A. C. 124

coast fisheries." The question is whether they are "small boats employed in local trade." Evidence has been given on behalf of the claimants as to what is done with these craft. Without reading the affidavit at length, it comes to this, that they were used for the purpose of facilitating the operations of the liners which run under the flag of the Woermann Line. They were used for the purpose of loading and discharging those liners, and of taking passengers and goods to and from them. It appears that the wooden lighters range from 7 tons to 50 tons, mostly under 40 tons; the iron lighters are of 75 tons; and the rafts of 18 tons. It seems to me, on the authority of *Procurator in Egypt* v. *Deutsches Kohlen Depot* (1), these are not "small boats employed in local trade." It is quite true that the tugs and lighters in that case, which were engaged in coaling ships in the Suez Canal, were larger than these; but these are of a fair size. Some of them, no doubt, are small, those that are only 7 tons, but they are not engaged in local trade. They are engaged in assisting the trade carried on by the big Woermann liners, which used to trade to South Africa before the war. Therefore, to my mind, those craft which were taken afloat or beached, either above or below high water line, at either of these places, are good and lawful prize, and should be condemned as such.

But now comes a very different question, and a much more difficult one on which I have great doubt. It arises in these circumstances. When the Union troops were approaching, whether they approached by land or by sea, a number of these lighters were put on rail and sent up to the interior of the country. I think some were sent about 100 miles, and some were sent about 300 miles, and some possibly to other places at different distances. The bulk of them were at Otavi and at Omaruru. They were taken up to Omaruru in August and September, 1914, and to Otavi in March and April, 1915. Between the time of September, 1914, when Luderitzbucht was occupied, and January, 1915, when Swakopmund was occupied, there is a blank, and I am told nothing at all as to what the Crown were doing, or what the operations were, until Omaruru

(1) [1919] A. C. 291.

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was captured on June 20 and Otavi on July 1, 1915. The only information before the Court is the affidavit of the Secretary to the Admiralty, Sir Oswyn Murray, in which he says, that: "His Majesty's military forces operating under the Government of the Union of South Africa in German South-West Africa, occupied Luderitzbucht on September 19, 1914, and Swakopmund on January 14, 1915, both those places being on the coast of that Protectorate. And in the course of their operations in the said German Protectorate the said forces occupied the northern section of the railway lines from Swakopmund to Otavi and found and seized at Omaruru, 148 miles inland, six lighters, and at Otavi, 310 miles inland, a launch and some lighters, rope fenders and other matters." That suggests to me, when it is said that the forces occupied the northern section of the railway lines from Swakopmund to Otavi, that they were approaching that section of railway from the land and not from the sea, and it suggests to me a land operation. The first part that would be occupied would be the southern part, which adjoins the coast line, and that might have been occupied early; it may only mean that it was not until June and July that they occupied the northern part, and so were in possession of the whole—I do not know. It is left very vague, and I do not know exactly what it means. But that is the only evidence I have. Upon that the position stands in this way. There was an occupation of the two places on the coast in September, 1914, and in January, 1915, respectively. No doubt operations of some kind were going on in the meantime. What they were I have not been told. Six months afterwards, speaking roughly on June 20, Omaruru was captured, and on July 1 Otavi was captured, and captured by the military forces. At these places there were found, not afloat, not in the river—the river was not passable, as I understand—but ashore, these lighters and other things, which had been taken up there, no doubt for the purpose of avoiding capture, and had remained there until, as a result of the climate and of the necessity of keeping them damp in order to avoid their becoming cracked and the seams opening altogether, one of them at any rate had become quite covered

with vegetation. The vegetation on the others does not seem to have been quite so luxuriant.

The question is whether they still remained at the time they were seized—and for the purposes of my judgment I am going to take the date given by Sir Oswyn Murray as the date of seizure, namely, the date when these two places were occupied —the subject of maritime prize. I should not have any right to doubt—and I have not any doubt—that Lord Parker was correct in saying, as he did in *The Roumanian* (1), that if property is liable to seizure at sea, and the enemy succeeds in getting ashore and escaping with his property, the belligerent who is trying to capture it has a right to pursue him and to take the property from him. I do not wish to throw the slightest doubt on that proposition. It was contended that I ought to treat this as a case of that kind, which is called sometimes a case of hot pursuit. This hot pursuit took six months, if it was a hot pursuit. I do not mean by that to say for a moment that the forces might not have been in hot pursuit all the time, and they might have been getting on as fast as they could after these craft to try and get them ; but I have no evidence that they were. It is just as consistent on the evidence before me that that expedition and these operations might have ceased for a time, and a new operation begun. I do not suggest it was so ; I do not know. All I know is, that after the first taking possession of the ports, there was an interval of about six months before these craft were taken at places respectively 150 and 300 miles up the country and were taken on land by military forces. It does not seem to me, in those circumstances, that they are the subject of maritime prize. I do not think it matters that they are craft that can be, and no doubt when they come into the possession of their former owners will be, put into the water again. They are property on land. They are taken by the land forces in land operations, and therefore I do not think they are the subject of maritime prize.

With regard to the lighters and other property seized in the interior there must be an order of release so far as concerns

(1) [1916] 1 A. C. 124.

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release as prize—they must be released from the Prize Court. The claimants contend that they must be released with an indemnity. That contention was put, as I understood it, upon two grounds. One ground was that they come under art. 53 of the IVth Hague Convention: "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or goods apart from cases governed by maritime law, depôts of arms, and, generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored, and indemnities for them regulated at the peace." I cannot say that I think that translation is very good, but there it is. I suppose it is the official translation. It seems to me quite clear that Mr. Wylie is right in saying that does not confer on me, sitting as Judge in Prize, the right, or impose on me the duty, of settling those indemnities. They are to be settled at the peace, and they are to be settled, as it seems to me, by diplomatic action. I do not think, therefore, on that ground I can give any judgment for any indemnity. There is another ground, and that is this. Wherever a captor brings articles into the Prize Court and asks for their condemnation, if he has wrongly seized them as prize, this Court has jurisdiction to say that the goods having been seized without any reasonable ground, the captor must pay damages. But in order to arrive at that conclusion the Court must find not merely that it was wrong, but that there could be no reasonable ground, for seizure. I think the Courts have always been disposed to scrutinize the case rather closely before they say that a captor had no reasonable ground for what he has done, because to interpret the rule too narrowly would be to hamper belligerents very much in the exercise of their rights. I do not think this was an easy question. It may well be that I am wrong in the conclusion to which I have come. But I cannot say that there was not sufficient doubt about this matter to afford reasonable grounds for what was done on behalf of the Crown. The cases show that where there is a document difficult to construe or a doctrine of law which is not very plain, a mistake in construing the document or interpreting the doctrine of law

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will not be considered as an unreasonable action on the part of the person who takes it, and I think that this case falls within that principle. Therefore, though I think there must be a release, I do not think there ought to be any damages given, and if there is to be any indemnity in respect of these craft under the Hague Convention that is a matter which will have to be settled elsewhere. Therefore, as to the craft and other things seized in the ports, either afloat or beached above or below high water, there will be a decree of condemnation. With regard to the articles which were seized at Omaruru and Otavi respectively there will be a release without any order as to damages or costs.

With regard to the other craft, some of which are alleged to belong to the German Government and some to various German owners, no question arises with regard to their having been seized on land. The evidence is a little vague, but I have come to the conclusion that all these craft were either afloat or beached above or below high water mark, and, therefore, they fall under the first part of the judgment, and there must be a decree of condemnation as to them.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitors for the claimants : *Goldberg & Barrett.*

E. C. T.

1919
May 6;
July 25.

(In Prize.)

THE ACHILLES and Other Ships.

[1918, No. 1921.]

Prize Court—Enemy Cargo—Sale by Controller appointed by Board of Trade—Seizure of Proceeds as Prize.

After the outbreak of war with Austria, a number of British vessels arrived at British ports with goods consigned to, and belonging to, an Austrian company with a branch at Manchester. The branch was placed under a controller appointed by the Board of Trade, who took possession of the goods at the respective ports, and, in the ordinary course of business, sold them to various Lancashire merchants and remitted the proceeds of sale to the Public Trustee, acting as the custodian of enemy property. The Public Trustee handed over the proceeds to the Admiralty Marshal, who seized them as prize and paid them into the Prize Court for adjudication:—

Held, that the goods having been sold by the controller, not as agent for the enemy firm, but as an officer of the High Court, the proceeds were held in medio to be dealt with according to the order of the Court, and, as the proceeds of enemy property seized in port, were liable to seizure and condemnation as prize.

Action for the condemnation as prize of the proceeds of sale of enemy goods.

The goods in question, shipped on British vessels before the outbreak of war with Austria, were consigned to the Manchester branch of an Austrian company, Alois Schweiger & Co. On the outbreak of war the branch was placed under a controller appointed by the Board of Trade, who took possession of the goods on their arrival at London, Liverpool and other ports, and sold them in the ordinary way of business to the customers of Alois Schweiger & Co. in Lancashire and elsewhere. The proceeds of sale were then remitted to the Public Trustee, acting as the custodian of enemy property, and by him were handed over to the Admiralty Marshal to be put in prize. No appearance or claim was entered on behalf of Alois Schweiger & Co.

1919. May 6. *C. W. Lilley* (*Sir Gordon Hewart A.-G.* with him) for the Procurator-General.

[The arguments and the cases cited are set out in the judgment.]

Cur. adv. vult.

1919. July 25. THE PRESIDENT (LORD STERNDALE). The Crown asks for the condemnation of a sum of 32,370*l.* 9*s.* 6*d.*, being the net proceeds of sale of various consignments and part consignments of hides, beeswax, gamboge, gum, and gutta percha, which had been shipped on board the British steamship *Achilles* and twelve other British vessels, and brought to this country and discharged in the ports of London, Liverpool and Hull.

The consignments all belonged to an Austrian company called Alois Schweiger & Co., which had a branch in Manchester, carried on in the name of Alois Schweiger & Co., Ld.

This branch was, after the outbreak of war, placed under a controller appointed by the Board of Trade. The controller sold all the goods and remitted the proceeds of sale, which are the subject-matter of this claim, to the Public Trustee, acting as custodian of enemy property. The Public Trustee in turn accounted for the proceeds to the Marshal who seized and arrested them as enemy property and paid them into the Prize Court for adjudication.

There is no doubt that the goods, when they were afloat, when they arrived in the British ports, and when they had been discharged into warehouses in those ports, were enemy property, and, as such, were liable to seizure and condemnation as good and lawful prize to the Crown in its right to droits of Admiralty: vide *The Achilles.* (1) Under those circumstances the late learned President condemned those parts of the consignments which had been seized unsold in the warehouses in the ports where they had been discharged, ex ten of these vessels. The remaining parts of those consignments had been sold, and the proceeds of their sale are included in this claim.

There is no doubt that the proceeds here claimed are enemy

(1) [1917] P. 218.

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property, and the only question is: are they liable to seizure and condemnation as good and lawful prize to the Crown in its right to droits of Admiralty?

The question arises because the property was not still in warehouse in specie, but had been realized. In a case which was cited to me which came before the late learned President, namely, *The Ballarat* (1), the proceeds of goods were condemned under circumstances very similar to these—in fact, circumstances stronger against the Crown, if I may put it in that way, or at any rate more likely to raise a doubt upon the matter than those in this case for reasons I will mention directly. In that case the goods had been shipped by the German company, the Metallgesellschaft, for which Messrs. Merton & Co. were acting as agents in this country, and Messrs. Merton & Co. had sold those goods and realized them, and had handed over the proceeds to a public official. The late learned President condemned those proceeds. That is no doubt a very strong case, because Messrs. Merton & Co. there were acting as the agents, as I understand the facts of that case, for the Metallgesellschaft, and, therefore, when they received the goods and sold them it was as if the Metallgesellschaft themselves had received and sold them. That case was not the subject of very much consideration before the late learned President, and I do not know that all the points which occurred in the argument of this case as difficulties were present to his mind at the time, but as I think this case does not fall within the same category as *The Ballarat* (1), I do not think that it is necessary to discuss that particular decision.

Another case which also came before the late learned President was cited to me with somewhat similar circumstances, though, again, not exactly the same, namely, *The Glenroy*. (2) The facts in that case were that the *Glenroy*, a British ship, which sailed from Shanghai before the outbreak of war, after hostilities began was diverted into the Port of London. Her cargo included some bags of sesame seed, shipped at Shanghai by a German firm, with offices at Hamburg, Hankow,

(1) Unreported. (2) [1918] P. 82.

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and Shanghai, the branches in China being registered in the German Consulates. The seed was consigned "to order, Rotterdam." After the ship arrived in the Port of London, the seeds, being unclaimed and of a perishable nature, were sold by the shipowners for the account of whomsoever it might concern, and the proceeds were handed over to the Admiralty Marshal, by whom they were seized as prize. The President held that the goods being subject to seizure and condemnation as enemy property in port, the proceeds of sale, nothing having intervened to change their ownership, must also be condemned. In that case the matter was argued at greater length and with more elaboration than in *The Ballarat*. Like this case now before me, it was only argued on one side. I regret, in the circumstances, that the argument could only be on one side, but every consideration that could have been advanced—supposing there had been a claimant to the goods—was put before me very fully by the learned counsel who appeared for the Crown. Therefore, I do not think really that any serious difficulty is occasioned by the fact of the case not having been argued on both sides. In *The Glenroy* (1), as in the present case, the passages in Story's Principles and Practice of Prize Courts, Pratt's ed., pp. 28-30, and the passages in Lord Parker's judgment in *The Roumanian* (2), in which he spoke in very wide language of the possibility of following goods which had once become liable to seizure, were cited. I think a construction must be put upon those words rather narrower than the construction which has been put upon them in this case and in some other cases which have been argued before me, but I do not think that it is necessary to discuss them at any length, because in my opinion this case does not raise such a wide question as was argued upon the authority of those statements.

In this case the goods were sold to different persons, chiefly in Lancashire, who were customers of the firm of Alois Schweiger & Co., and who bought the goods for the purpose of using them in their business. They were sold not in one lot, but in small lots in the ordinary way of business. If

(1) [1918] P. 82. (2) [1916] 1 A. C. 124.

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that had been done by Alois Schweiger & Co. themselves, or by somebody acting simply as their agent, I think it would be, at any rate, an arguable question whether the Crown were entitled to condemnation. But that is not the position. The position is that they were sold, and dealt with, by the controller who was appointed under the Trading with the Enemy Act in order to manage and take care of the business of Alois Schweiger & Co.

The position of such a controller so appointed is defined in the Act of Parliament under which he is appointed, that is, the Trading with the Enemy Act of 1914 (4 & 5 Geo. 5, c. 87), s. 3, which says: "In certain circumstances"—of which this is one—"the Board of Trade may apply to the High Court for the appointment of a controller of the firm or company, and the High Court shall have power to appoint such a controller, for such time and subject to such conditions and with such powers as the Court thinks fit, and the powers so conferred shall be either those of a receiver and manager or those powers subject to such modifications, restrictions, or extensions as the Court thinks fit." The controller, therefore, is in the position of a receiver and manager appointed by the Court, whose position is stated in Kerr's Law and Practice as to Receivers, 6th. ed., as follows: "The effect of the appointment of a receiver is to remove the parties to the action"—here, of course, there are no parties—"from the possession of the property" (p. 176). Then again on p. 181: "The possession of a receiver appointed in an action is the possession of the Court." And at p. 184: "If the receivership order does not contain a direction for payment to the judgment creditor, the receiver holds the property, when it reaches his hands, in medio, and it remains subject to all claims which are paramount to that of the judgment creditor at the date when the order is obtained." Of course those passages are not applicable in terms to this case, because there are no parties to the action, there is no judgment creditor, but they do show that the receiver and manager, like the controller, is an officer of the Court and is not the agent of the person who owns the business which he is controlling.

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Again, I find in *Burt, Boulton & Hayward* v. *Bull* (1) these passages. Lord Esher M.R. says: "What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly. The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court." Then Lopes L.J. says—this was a question as to whether the receiver and manager was personally liable under the contract to pay for the goods—"It was argued that the defendants had only given the order as agents. But the company after their appointment had no control over the business; it could give no orders and make no contracts. The defendants could not be said to be agents for anybody."

That was the position of the controller according to the Act, and the result of that is that when he received these proceeds and dealt with these goods, he did so not as agent for Alois Schweiger & Co. at all, but as an officer appointed by the Court to take possession of the goods belonging to that company, and, if he sold the goods, their proceeds, to deal with them according to the Order of the Court. That seems to me to put him in the same position as the master of the ship who sold the goods in *The Glenroy*. (2) In each case the seller—the master in the one case, the controller in the other—did not hold the proceeds as agent for the company, but held them as the person who had to account for them in the same way as he would have to account for the goods.

Under these circumstances it seems to me that this case falls within the decision of *The Glenroy*. (2) There was a fund which was put, as Kerr says, in medio, and according

(1) [1895] 1 Q. B. 276, 279, 282. (2) [1918] P. 82.

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to *The Glenroy* (1), where there is a fund of that kind arising from the sale of goods which were liable to seizure, those proceeds are liable to seizure. There is no doubt, I think, that that decision is a considerable extension of the old doctrine of seizing goods. I doubt very much whether under the old doctrine when goods were once gone, and the goods themselves could not be seized, any seizure of proceeds would have been allowed; but circumstances change, and the principles upon which the Court acts have to be adapted to changed circumstances. It seems to me that, considering these proceeds were received by the controller, this case falls within the authority of *The Glenroy* (1), and, therefore, there must be an order of condemnation.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

(IN PRIZE.)

1919

July 24, 25.

THE ORANJE NASSAU AND OTHER SHIPS.

[1918, No. 1018.]

Prize Court—Cargo—Conditional Contraband—Continuous Voyage—Named Consignees—Consignments to the N. O. T.—Order in Council of October 29, 1914—*Declaration of London*, 1909, *art.* 35.

It is a question of fact in each case whether the N.O.T. (the Netherlands Oversea Trust) are consignees within the meaning of the Order in Council of October 29, 1914, and the decisions thereunder, the effect of which was to modify art. 35 of the Declaration of London, 1909, and to provide that conditional contraband destined for the enemy should be liable to capture on board a vessel bound for a neutral port, inter alia, if the ship's papers did not show who was the consignee of the goods (construed in *The Louisiana* [1918] A. C. 461 to be a person other than the consignor to whom the consignor has parted with the control of the goods).

If the N. O T. were merely receiving conditional contraband goods as agents for the consignor to dispose of in accordance with his directions, then, if the goods had an ultimate enemy destination, they would be liable to condemnation; but if the N. O. T. were receiving the goods as agents for persons who had bought them and had the control over them, then, whatever their ultimate destination, the goods would not be liable to condemnation.

(1) [1918] P. 82.

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ACTION for the condemnation of a quantity of coffee and cocoa as conditional contraband destined for Germany.

The bags of coffee and cocoa in question were shipped on three neutral vessels, the *Oranje Nassau*, the *Prins der Nederlanden* and the *Orion* by the claimant, Carl Voigt, at all material times a German subject domiciled in Haiti, for carriage to Holland, the consignees in each case being the N. O. T. (the Netherlands Oversea Trust), either as agents for the claimant or as agents for the Rotterdamsche Bankvereeniging, who had made advances to the claimant against the goods. The shipments were all made while the Declaration of London Order in Council, No. 2, of October 29, 1914, was in force. (1) By that Order in Council art. 35 of the unratified Declaration of London, 1909, which abrogated the doctrine of continuous voyage in the case of conditional contraband, was adopted, subject to modification. Clause 1 (iii.) provided that, notwithstanding the provisions of art. 35, conditional contraband should be liable to capture on board a vessel bound for a neutral port "if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods."

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.*, and *Clive Lawrence* for the Procurator-General.

Sir Robert Aske for the claimant.

[It was contended on behalf of the claimant that the N. O. T. being the named consignees in the bills of lading, and persons who would only part with the control of the goods on being furnished with suitable guarantees, the ships' papers showed who were the consignees of the goods, and that under no circumstances, whatever their ultimate destination, were they liable to condemnation : *The Kronprinzessin Victoria.* (2) The Crown's contention on the other hand was that the N. O. T. were not persons other than the consignor to whom the consignor had parted "with the real control of the goods" :

(1) This Order in Council (1914, No. 1614) in effect was repealed by an Order in Council of March 30, 1916 (1916, No. 197), and was withdrawn by an Order in Council of July 7, 1916 (1916, No. 452).

(2) [1919] A. C. 261.

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The Louisiana (1); *The Kronprins Gustaf* (2); and that if, as the evidence showed, the consignor intended the goods for the enemy, they were liable to condemnation.]

THE PRESIDENT (LORD STERNDALE). This case is concerned with shipments of coffee upon three vessels. The first parcel consists of twenty-seven bags of coffee and fifty-five of cocoa, the twenty-seven bags being part of a larger consignment shipped on the *Oranje Nassau*; 1310 bags of coffee were shipped by the *Prins der Nederlanden*; and three parcels of 819, 260, and 68 bags of coffee were on board the *Orion* transhipped from other vessels. They were all shipped by a gentleman of the name of Voigt, who lives at Haiti, and in each case they were shipped from Aux Cayes, Haiti, to the N. O. T. In the first case the shipment by the *Oranje Nassau* was to the N. O. T. simply, without specifying what should be done afterwards; in the case of the *Prins der Nederlanden* it was to the N. O. T. for the Rotterdamsche Bankvereeniging; one of the shipments on the *Orion* was 819 bags to the N.O.T. for the bankers of Hooft & Co.; in the remaining cases the shipments were to the N.O.T. and again for the Rotterdamsche Bankvereeniging.

There are one or two preliminary questions to be decided first. In the first place the question arises as to the character of Mr. Voigt, namely, whether he was an enemy or not. As far as I can ascertain from the evidence, he is a German who was resident and carrying on business at Haiti; and so far as I know he had no place of business elsewhere. There is a certificate that in 1917 he was naturalized. I do not think, looking at the letter read from his son, that he was naturalized at the time of the transactions in question; at any rate there is nothing to show that he was. But to my mind that is immaterial. He was carrying on business at Haiti with a commercial domicil there, and therefore I think the property acquired by him in his business there was neutral, and not enemy, property. Therefore it does not really matter, except perhaps as throwing some light on his intentions, that he was a German.

(1) [1918] A. C. 461. (2) Ante, p. 182.

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It was contended on behalf of the claimant that in any event, whatever the decision as to enemy destination, the only order that can be made is an order of detention. That contention was based on the ground that these shipments, even if intended for Germany, came under the protection of the Order in Council of October 29, 1914, because all the consignments were to the N. O. T., and as they had control over the consignments, they were consignees within the meaning of *The Louisiana* (1) and other cases. I do not think that contention is correct. The N. O. T. was established in order to prevent contraband being sent into Germany, and in order that goods might be shipped to them to avoid interference from the British authorities, so that neutral trade might not be molested more than was necessary. But the character in which the N. O. T. received the consignments seems to me to depend upon the facts of each particular case. If they received consignments as agents for consignees who had bought, or purchasers who had bought, the goods, and who, when they arrived in Holland, had the control over them, and could direct their ultimate destination as they liked, then the character of the N. O. T. was that of the purchaser to whom the goods were going, and the N. O. T. would be consignees within the meaning of the Order in Council, and the decisions upon it. But if the N. O. T. were only receiving goods as agents for the consignor, to dispose of them later for the consignor in the way in which he directed, then in my opinion they would not be such consignees, and their position again would be that of the person for whom they were receiving the goods. It is true that there was a stipulation that they should not give up the goods until certain requirements of theirs had been complied with and certain agreements had been signed with them as to the ultimate use of the goods; but when that was done the N. O. T. had to give up the goods to the person for whom they were acting, and the determination of what was to be done with them rested not with the N. O. T. at all, but with the person for whom they had taken them up. Therefore it does not seem to me

(1) [1918] A. C. 461.

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that it can be said that the N. O. T. were persons other than the consignor who had the complete control of the goods. They could control them to the extent, as I say, that they would not give them up until certain stipulations had been complied with; but, when once in the hands of the person for whom they were sent, the N. O. T. could not control them any further.

In the first case, the N. O. T. were the consignees named in the bill of lading, without anything more. And as they had no interest in the goods at all, they would hold them, when they got them, for the consignor. They had not been sold to anyone, and the N. O. T. would have to do with them—subject to their requirements being complied with—as the consignor wished. In each three of the other cases they received the goods for the Rotterdamsche Bankvereeniging, a company which had advanced against the goods, and having advanced against the goods, were to dispose of them so as to repay themselves the advances, accounting to the shipper, or the person to whom they had advanced, for the balance after those advances had been paid. They were not the persons who had control of the goods within the meaning of the cases. They had, to a certain extent, I suppose, a discretion as to the selling of the goods, because they had to sell them at the best price, but they had to sell them subject to the control of the shipper—or rather, they had to sell them under a power of sale given to them in order to repay the advances, and they had to account to the shipper for any balance which they had received. In the last case the N. O. T. were to receive the goods for the bankers of Hooft & Co. Hooft & Co. were persons with whom it is said a contract had been made for the sale and purchase of these goods, and their bankers had made an advance to Voigt. I do not know whether there was really a genuine sale. Possibly, in that case, the N. O. T. might be said to be receiving the goods for Hooft & Co., who had the complete control over them, and then they might come within the meaning of the Order in Council of October 29, 1914. But as a matter of fact in this particular instance of the *Orion* shipment, the sales

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to Hooft & Co. were not made until after the date of seizure. I shall have to examine later whether Hooft & Co. were acting as independent persons, or whether they were acting with, and under, the direction of the consignor. Therefore I do not think that it is right to say that the only order that can be made here is an order of detention. I therefore have to determine whether there was an enemy destination. [His Lordship then dealt with the evidence in detail, and said that it showed that all the parties concerned were engaged in the business of sending consignments via Voigt for the purpose of getting them into Germany. His Lordship continued :] The question I have to answer is this : Is the claimant's evidence sufficient to rebut the prima facie case which has been made by the Crown showing that all these people were doing their best to get the goods into Germany and were all working for the same end and pursuing the same method ? I do not think it does rebut it. I think the intention of the claimant was to get these goods into Germany if he could. It is pointed out in some of the letters that although there were difficulties, the goods had got into Germany afterwards. It is certainly to my mind a material circumstance that the only persons who could be found to purchase any of these goods at any time are Hooft & Co., a firm who had been fined heavily for a breach of the N. O. T. stipulations and contracts.

The case for the claimant is not sufficient to rebut the presumption arising from the Crown's case, and there must be a decree of condemnation with costs.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitors for the claimant : *Waltons & Co.*

E. C. T.

1919
June 30;
July 7.

ROBINSON *v.* ROBINSON.

Divorce—Wife's Petition—Desertion—Order under Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5—*Provision that Wife not bound to cohabit—Order made before Completion of Two Years' Desertion—Husband not served with Order—Intention to desert—Question of Fact.*

An order under the Summary Jurisdiction (Married Women) Act, 1895, that the husband pay a weekly sum for the wife's maintenance containing the clause "that the applicant be no longer bound to cohabit with her husband," releases both spouses from the duty to cohabit. The continuance after such an order by the husband of a separation commenced by him before the order under circumstances amounting to desertion cannot make him guilty of "desertion for two years without reasonable excuse," even though the continuance may be owing to his intention to desert his wife and not to obedience to the order; and (*semble*) though the order has not been served on him or brought to his notice.

Dodd v. *Dodd* [1906] P. 189 and *Harriman* v. *Harriman* [1909] P. 123 followed.

Dictum of Buckley L.J. in *Harriman* v. *Harriman* [1909] P. 148, that "the question whether there was a continuing desertion after the non-cohabitation order may well be a question of fact," not followed.

This was a wife's petition for divorce on the ground of desertion and adultery.

The parties were married on November 30, 1906. On December 30, 1909, the husband left his wife, declaring that he did not intend to return. There was one child of the marriage then living. The husband never after leaving paid anything for the maintenance of his wife and child. On March 16, 1910, the wife took out a summons under the Summary Jurisdiction (Married Women) Act, 1895, against her husband for wilful neglect to provide maintenance for herself and the child. The husband had notice of the summons, and a solicitor appeared for him at the first hearing, but before the order was made he went to Canada to avoid service of the order, leaving a letter for his wife in which he said that she could do what she liked, he would never return or contribute to the child's support. The magistrates ordered that the husband should pay ten shillings a week for maintenance

of his wife and child, and gave the wife custody of the child. The order contained the provision that "the applicant be no longer bound to cohabit with her husband." This order was not served on the husband, nor was it proved that he had notice of it. He never paid anything for maintenance. In December, 1916, he returned to England, and this petition was filed in April, 1919, alleging two years' desertion and adultery in 1916 and afterwards. Evidence was given of the adultery and that the husband after his return to England had repeatedly said he did not mean to return to his wife.

Grazebrook for the petitioner. It is laid down in *Harriman* v. *Harriman* (1) that after an order containing the non-cohabitation clause, the two years' period of desertion necessary for a divorce cannot continue to run. But this case is distinguishable on the facts. Buckley L.J. there suggested that there might be an exception from the rule if it were shown that the continued separation was really due to a continuing intention to desert and not to obedience to the order. In this case the evidence is absolutely clear that the husband's absence was due to a continuing intention to desert.

The case was undefended.

HORRIDGE J. said he was satisfied as to the adultery, but reserved judgment on the question of desertion.

Cur. adv. vult.

July 7. HORRIDGE J., after stating the facts of the case: It was contended before me that although the case of *Harriman* v. *Harriman* (1) decided that on the facts then before the Court an order for weekly payments containing the non-cohabitation clause prevented the desertion continuing, the judgment of Buckley L.J. showed that there might be a case in which a respondent, who had stayed away from his wife not on the ground of obedience to the order but because he wished to desert her, might be held to have deserted her notwithstanding the non-cohabitation clause.

(1) [1909] P. 123.

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ROBINSON v. ROBINSON. Horridge J.

I have carefully considered that case and *Dodd* v. *Dodd* (1), and I think the remarks of Buckley L.J. were obiter dicta, and I do not think they are in accordance with the meaning of s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, or with the judgment of Gorell Barnes P. in *Dodd* v. *Dodd* (1), or with the judgments of the other members of the Court of Appeal in *Harriman* v. *Harriman*. (2)

Sect. 5 provides that the Court of Summary Jurisdiction, to which any application under the Act is made, may make an order or orders containing "a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)."

Gorell Barnes P. in *Dodd* v. *Dodd* (3), referring to the words "shall have the force in all respects of a decree of judicial separation on the ground of cruelty," says: "Now what is the effect of these words? In my opinion their effect is to be gathered from the provisions of ss. 7, 25 and 26 of the Act of 1857, the result of which is that a wife, in a case of judicial separation, is to be considered a feme sole in respect of property which she may acquire, and also for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceedings. She thus obtains complete protection from her husband, and he can in no way interfere with her."

In *Harriman* v. *Harriman* (4) Fletcher Moulton L.J. says: "It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit." Farwell L.J. says (5): "But I fail to see how a husband who is prevented by the order obtained by his wife from returning to live with her can be said to have deserted her; the wife who has rejected her husband cannot call herself deserted by him." And Kennedy L.J. says (6): "How can a husband be said to be deserting his wife 'without cause' or 'without reasonable excuse' so long as his wife has

(1) [1906] P. 189.
(2) [1909] P. 123.
(3) [1906] P. 189, 200.
(4) [1909] P. 137.
(5) [1909] P. 146.
(6) [1909] P. 154.

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obtained an order which is still on foot and which debars him from returning to her? How can he be bound to cohabit, if she is not?"

I think the effect of the section which makes the order equal to a decree for judicial separation does away with the duty of either spouse to cohabit with the other.

For these reasons I do not think the petitioner is entitled to a divorce.

If contrary to the view I have expressed Buckley L.J. is correct in saying in *Harriman* v. *Harriman* (1): "Such considerations as these seem to me to shew that the question whether there was a continuing desertion after the non-cohabitation order may well be a question of fact," I should be prepared to hold that the husband's continued separation from the wife was not in this case in obedience to the order, but was owing to his intention to desert her and not to return to her.

Solicitors: *Maude and Tunnicliffe, for Green & Williamson, Wakefield.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.

1919

June 30; *July* 1.

THE HASSEL.

[1918 S. 11.]

Admiralty—Collision—Pilot Vessel—Lights—"Pilot vessels engaged on their station"—Regulations for preventing Collisions at Sea, art. 8.

A pilot cutter, coming out of Barry dock to put a pilot on board a vessel which had signalled for a pilot, was carrying at her masthead the "all round" white light provided by art. 8 of the Regulations for Preventing Collisions at Sea for pilot vessels "engaged on their station on pilotage duty":—

Held, per Scrutton L.J., that she was not engaged on her station on pilotage duty within the meaning of this regulation, and that her duty, therefore, when under way, was to carry the lights similar to those of other vessels of her tonnage.

Judgment of Hill J., ante, p. 116, affirmed.

(1) [1909] P. 148.

C. A. 1919

THE HASSEL.

APPEAL from a judgment of Hill J., reported ante, p. 116.

The plaintiffs were the owners of the pilot cutter *Shamrock* and her master and crew proceeding for their lost effects; the defendants were the owners of the Norwegian steamship *Hassel*.

On January 25, 1918, the *Shamrock*, which had her sails set, but as there was little or no wind was being propelled by oars, was proceeding out from Barry dock to a vessel which had signalled for a pilot. She had reached the entrance between the breakwaters when she was run down and sunk by the *Hassel* which was bound into dock. The *Shamrock* was exhibiting at her masthead an all round white light which those on the *Hassel* only picked up among the other white lights near the entrance, at a distance of about 300 yards. By art. 8 of the Regulations for preventing Collisions at Sea a vessel "engaged on her station on pilotage duty shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare up light or flare up lights at short intervals, which shall never exceed 15 minutes," and, on the near approach of or to other vessels shall have her side lights "lighted, ready for use, and shall flash or show them at short intervals" to indicate the direction in which she is heading.

Hill J. held that, although on pilotage duty, the *Shamrock* was not engaged on her station on pilotage duty, and her obligation, therefore, was to carry lights similar to those of other vessels of her tonnage; that the exhibition of the all round light and nothing else, was misleading; and that the defendants were not negligent in not picking up the light among the number of others off the entrance soon enough to avoid the collision. The plaintiffs appealed.

Bateson K.C. and *Lewis Noad* for the appellants.

Laing K.C. and *Dumas* for the respondents.

[The arguments were entirely directed to the question whether those on the *Hassel* ought to have seen and appreciated what the light of the *Shamrock* was earlier than they did, and, when they did appreciate that it was the light of a sailing vessel

whether they took proper measures to endeavour to get out of her way.]

C. A. 1919

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BANKES L.J. This is an appeal from a judgment of Hill J. in an action in which the owners of the *Shamrock* claimed that the loss of that vessel in a collision which occurred between the *Shamrock* and the *Hassel* was due entirely to the fault of those in charge of the *Hassel*. The learned judge found that the *Hassel* was not to blame, and upon that finding gave judgment for the defendants, and the plaintiffs now appeal.

There is a good deal in the story of the events which preceded the accident about which there is no dispute. The *Shamrock* was a pilot cutter about 50 feet in length. She had been lying moored to a buoy a short distance inside the western breakwater at the entrance to Barry harbour. The collision occurred on the evening of January 25, 1918, at 7.30, and it is admitted on all hands that it was a fine clear night, and there was no appreciable wind. It is unfortunate that no evidence was given as to the exact position in which the *Shamrock* was lying, and what course she took in getting from her moorings to the place where the collision occurred. But no evidence was given about that, and the case of the *Shamrock* was confined to the statement that she was being navigated with sweeps, that she was proceeding at the rate of about one knot, and that, at the time of the collision, she had got past the western breakwater and outside the entrance, a distance perhaps of some 300 feet, and she was then proceeding on a course heading south-west.

The *Hassel's* case as pleaded was that when the *Shamrock* came into view, she was apparently close to the western breakwater, and one of the questions about which there was a dispute was as to the exact position of the *Shamrock* at the time the collision occurred. It is quite true that, both in the preliminary act and the defence, the defendants had pleaded that the *Shamrock* was apparently close to the western breakwater, but when they came to give their evidence, they asserted that the real position, as ultimately ascertained, of the *Shamrock* was that she was practically halfway between

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the two breakwaters right in the entrance to the harbour, and the learned judge accepted the *Hassel's* story on that point. He says: "I find that the collision was in the line across the ends of the breakwaters, or possibly a little outside that line." In that finding I concur, and that, therefore, places the position of the *Shamrock* at the time of the collision.

The *Shamrock* was showing one bright white light, a masthead light, and that was the only light she was showing. I think that, had a different view been taken in reference to those on board the *Hassel* appreciating what that white light meant, there might have been a very serious question as to whether the *Shamrock* was, under the circumstances, showing the proper light. But, having regard to the advice that was given to the learned judge in the court below, and the same advice given to us by our assessors in this court, it is not really necessary to consider whether the *Shamrock* had or had not, under the circumstances in which she was placed, the proper lights. She had this one bright white light, and it is not disputed that that light was discernible at a very considerable distance. Those on board the *Hassel* said they did not appreciate that this white light was the light of a vessel until they got within about a cable or a cable and a half's length of it, and the reason which they gave for that was that there were so many white lights showing at that part of the dock, and that this vessel was moving at so slow a pace that it was not reasonable to expect that any proper lookout should have appreciated that there was a vessel right in the middle of the fairway. At the time when the docking light was clearly exposed, inviting vessels to enter, it was not reasonable to expect that they should or could have appreciated that fact. In the court below the judge was advised, and he accepted the advice, that that case on the part of those on board the *Hassel* was a reasonable answer, and we are given the same advice by our assessors. I accept it, and think under the circumstances that there was no negligence on the part of those on board the *Hassel* in not appreciating sooner than they did the fact that the *Shamrock* was in the position in which she was, being moved slowly right across the entrance

to the dock by sweeps at the time when the *Hassel* was being invited to their knowledge to enter through this narrow and awkward entrance.

It is obvious, therefore, that the *Shamrock* had placed herself in a position not only of very considerable danger to herself, but a position which rendered the navigation of any vessel coming into this narrow entrance under the then existing conditions very difficult, and also very dangerous. There was an ebb tide running with the force of about two and a half to three knots, and the evidence also was that for some little distance just outside the entrance the tide had very much less effect than it had a little further out, and therefore, in the case of a vessel like the *Hassel*, which was 340 feet long, there came a period when the tide would have much more influence upon her stern than upon her bows, and would tend, therefore, to sweep her round ; and having regard to her length and to the fact that the entrance was only 350 feet wide, that might place her in a position in which it was extremely difficult for her to manœuvre without running great risk of fouling either the eastern or the western breakwater.

That was the position of these two vessels, as found by the learned judge in the court below, and whose finding we accept. But then it was said, that, assuming that to be the case, those on board the *Hassel* were guilty of negligence because, appreciating as they did the fact that the *Shamrock* was where she was, and that the two vessels were that distance apart, the *Hassel* could by the exercise of proper manœuvres have avoided the collision, and it was contended that the manœuvres which she ought to have executed were to reverse or, by proper tug action, to have secured that her head should be drawn sufficiently to starboard to avoid any collision with this little cutter.

[His Lordship dealt with the evidence on this point, and said that he accepted the advice of the assessors that it was too dangerous for the *Hassel* to reverse, and that there was nothing she could be properly called upon to do which would have prevented the collision.]

On these grounds the appeal fails, and must be dismissed with costs.

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SCRUTTON L.J. I would merely concur but for the fact that I think a general question of importance to pilotage cutters is involved. [His Lordship stated the respective cases and continued:] The first question is, taking the *Hassel's* own story of the distance at which she first saw the *Shamrock*, could she, by the exercise of reasonable care and skill, have avoided the pilot cutter lying in the entrance? That is a pure question of seamanship, and I do not feel sufficient confidence in my own nautical knowledge to accept the suggestion of counsel for the appellants who invite me to disregard the opinion of four competent seamen. The second question is whether those on the *Hassel* ought to have seen the cutter earlier. Again, we are advised by our assessors that there was no negligence in not realizing sooner that the white light on the *Hassel* was not a shore light. Those two findings are necessary to support the judgment in the court below that the *Hassel* could not by reasonable care and skill have avoided the cutter.

In my view the cutter was quite wrong in carrying only her masthead white light. That would be the light to show if she were "engaged on her station on pilotage duty," but I do not think that because a cutter is going to put a pilot on board some ship or is bringing a pilot away from some ship, she is "engaged on her station on pilotage duty" or is entitled to carry a white light only and not side lights. I think this pilot cutter would have created some astonishment in Barry harbour if she had started letting off flares. I think that the harbour master would have stopped the fireworks very promptly, for the reason that she was not on her station on pilotage duty. I gather that it is a habit with pilot cutters to take an extended view of what is their station, and I think the sooner they put the idea out of their heads, and have recourse to ordinary sidelights which will give other vessels a much better chance of seeing what they are and what they are doing, the better. I agree with the decision in *The Reginald* (1), where it was held that a pilot cutter returning from her pilotage station with only a white light was not exhibiting proper lights.

(1) (1907) 10 Asp. M. L. C. 519.

Further, the *Shamrock* came out just about the time the docking signal was exhibited for the *Hassel* to enter. The cutter could quite easily have stopped. In going on when there was no reason for doing so she was asking for trouble, and was putting difficulties in the way of a big ship to which pilot cutters are merely ancillary. I agree that the appeal should be dismissed.

EVE J. I have had some difficulty in making up my mind, but I am satisfied that the decision turns on questions of seamanship on which we ought to avail ourselves of the advice of our assessors. On the questions whether the cutter was on her pilotage station and was exhibiting proper lights I prefer to keep an open mind, as these matters were not argued on the appeal.

Solicitors for appellants: *Gamlen, Bowerman & Forward, for Hunter & White, Newport.*

Solicitor for respondents: *Gilbert Robertson, Cardiff.*

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[IN THE COURT OF APPEAL.]

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[1918, fol. 235.]

Admiralty—Collision—"Not under Command"—Keeping Course and Speed—Regulations for preventing Collisions at Sea, 1897, *arts.* 4 *and* 21.

A vessel may be entitled to hoist the "not under command" signal although not absolutely helpless if she is in such a condition that she cannot take the ordinary and prompt manœuvres which a vessel of her type may reasonably be expected to take.

A vessel which is not under command, and has hoisted the appropriate signal under art. 4 of the Regulations for preventing Collisions at Sea, is not thereby converted into the "keep course and speed" vessel under art. 21.

Per Scrutton L.J. The "not under command" vessel, by first taking one course of action and then suddenly adopting another without any justification, must not mislead other vessels which have to keep out of her way, but she is entitled to take whatever are the proper manœuvres under the peculiar circumstances of danger she is in.

The Hawthornbank [1904] P. 120 considered and explained.

APPEAL from a judgment of Roche J. in an action of damage by collision.

The plaintiffs were the owners of the steamship *Mendip Range;* the defendant was Captain Stephen H. Radcliffe, R.N., commanding His Majesty's ship *Drake*.

The collision took place in Rathlin Sound on the morning of October 2, 1917, in fine, clear weather. The wind was southerly, a light to a moderate breeze, and the tide, which was flood, was setting to the eastward with the force of about two knots.

According to the statement of claim the *Mendip Range*, a screw steamship of 4,495 tons gross, 385 feet in length, was in Rathlin Sound in the course of her voyage from Philadelphia to Glasgow with a general cargo, manned by a crew of 42 hands. She was on a course of S.E. $\frac{3}{4}$ E., magnetic, making about ten knots, when the *Drake* was seen about three miles distant and about three miles on the port bow of the *Mendip Range*,

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in company with destroyers and enveloped in smoke clouds. She was steering S.W. Shortly afterwards the *Drake* was seen to be exhibiting two discs indicating that she was not under command. When about a mile distant the helm of the *Mendip Range* was starboarded and two short blasts sounded. While the *Mendip Range* was going off under starboard helm, the *Drake*, being then on the starboard bow of the *Mendip Range*, was observed to be turning to starboard. As it was impossible to clear by porting, the helm of the *Mendip Range* was put hard a-starboard, her engines were put full speed astern, and three short blasts sounded; but the *Drake* continued to turn to starboard and with her ram struck the starboard side of the *Mendip Range*, doing so much damage that she had to be beached.

The plaintiffs alleged that the defendant and those on board the *Drake*, inter alia, failed to keep their course and speed, improperly exhibited "not under command" signals, and ported the helm or allowed her head to go to starboard after displaying the "not under command" signals.

According to the defence, the cruiser *Drake*, while in charge of the defendant, was to the southward and eastward of Rathlin Island. She had been torpedoed and was heading to the southward in a disabled and damaged condition with a heavy list to starboard. She was making about five or six knots and swinging under port helm with the object of rounding Rue Point and trying to reach Church Bay, when the *Mendip Range*, which was one of the convoy which the *Drake* had been escorting before she was torpedoed, was seen about three or four miles distant and about six points on the starboard bow. The *Drake* exhibited two black shapes to indicate that she was not under command, and she kept her helm aport and sounded a short blast on the fog horn, the whistle having been damaged in the explosion. The *Mendip Range*, when crossing ahead of the *Drake*, altered her course to port, and although the *Drake* signalled to her by flags and waved to her to keep clear, and the engines were stopped and put full speed astern and the helm was put amidships, the *Mendip Range* came on with considerable speed under starboard helm, recrossing

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the bows of the *Drake* from port to starboard, and with her starboard side struck the stem of the *Drake*.

The defendant alleged that those on board the *Mendip Range* were negligent, inter alia, in starboarding and in not keeping out of the way of the *Drake*.

ROCHE J., in giving judgment, said that he found that the greater part of the *Drake's* alteration occurred at quite a late stage, and that, although the action of the *Drake* under port helm was taken before the *Mendip Range* altered under starboard helm, its effect was not such as to become apparent to those on the *Mendip Range;* that the *Mendip Range* thereupon starboarded, and the port helm of the *Drake* was adhered to; and thus the collision was brought about. On the question whether the *Drake* was improperly exhibiting "not under command" signals his Lordship said that he found great difficulty in deciding the question as the Elder Brethren differed. As to engines, both agreed that the *Drake* was under command. As to helm one Elder Brother thought that she was under command and ought not to have exhibited the two black shapes, as he was of opinion that she was able to get out of the way of another vessel in the manner that vessel would have reason to anticipate. The other Elder Brother took the opposite view, on the ground that, the steam steering gear having been rendered useless and the telephonic communication having also broken down, it would take a very considerable time to pass the orders along to the helm by word of mouth. In these circumstances his Lordship said that he was unable to find that the commander of the *Drake* was negligent in hoisting the "not under command" signal. As to the main charge made against the *Drake*—namely, that she improperly ported her helm—the learned judge said: "That is the attack that is made upon her, based upon the authority of *The Hawthornbank* (1), and it amounts to this, that if a vessel shows 'not under command' signals, she must adhere to the policy which she has indicated will be her policy. As to that, of course, much, if not everything, depends upon

(1) [1904] P. 120.

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what one finds was done; and I have found that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range;* and I am satisfied that port helm action was taken, not for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shoal water. I am advised that although she was not a sinking ship, as is evidenced by the fact that she was going to anchor in shoal water and not immediately to beach, yet that it was eminently desirable that she should get to that place as soon as possible, and that all the indications are that those in charge of the ship were doing their best to that end. In these circumstances, I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass and would be able to pass clear of her on her port side and to the southward of her, and I do not find the course, taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course. That really disposes of the case against the *Drake*."

His Lordship added that, although there was no counterclaim, he had been asked to give judgment as if there were a counterclaim; he did not, however, find negligence on the part of the *Mendip Range;* and there were findings, therefore, that neither ship was to blame. The result was there would be judgment for the defendant, each party to bear their own costs.

The plaintiffs appealed.

Laing K.C. and *Lewis Noad* for the appellants.

Aspinall K.C. and *C. R. Dunlop K.C.* for the respondent.

The arguments and the cases cited are fully set out in the judgments.

BANKES L.J. This was an action in which the owners of the steamship *Mendip Range* sought to establish that the damage to that vessel which was suffered in consequence of a collision between the *Mendip Range* and H.M.S. *Drake* was due to the negligence of those in charge of the *Drake*. The

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Drake had been torpedoed, and shortly before the collision occurred she had exhibited the signal which is prescribed by art. 4 for a vessel not under command. Considerable importance in this case attaches to the proper construction of that article, and to a decision as to what, under the article, is the necessary consequence of a compliance with it.

Counsel for the appellants has contended that those in charge of the *Drake* were not justified in exhibiting the "not under command" signal, on the ground that the condition of the vessel was not such as would justify any careful and skilful seaman in considering that she was not under command so as to justify acting under art. 4 of the Regulations. The article provides that where this signal is exhibited the lights and shapes under sub-section (*d*) of the article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way. As I understand the appellant's argument it is that because the article says that the vessel flying the signal cannot get out of the way, it follows that the other vessel must get out of the way; and it further follows that because the other vessel must get out of the way, art. 21 applies to the vessel flying the signal, and she must therefore keep her course and speed. That contention raises an important matter. First of all, what is the proper construction of the article dealing with a vessel which is not under command? Personally, I do not think it is possible to give any definition of what will constitute a vessel not under command, and I think the undesirability of attempting to do so is well indicated by the view taken by Lord Herschell in *The P. Caland*. (1) In the Court of Appeal the Master of the Rolls had attempted to lay down what might be called a rule of construction. (2) He said: "Looking at the words of the statute—the first part of the clause which speaks of her not being under command, and the second of her not being under command so that she cannot keep out of the way—taking these two together, it seems to me that the real construction of the rules is that she must be in such a position that she is not under command in this

(1) [1893] A. C. 207. (2) [1892] P. 193, 196.

sense, that she cannot keep out of the way of another vessel coming near her. If she can be steered and if she can be stopped and can go ahead, which is necessary in order that she may be steered, then she is under command, and the apprehension of her being likely, however well founded, in a few moments to be out of command does not show that she is out of command at the moment spoken of." Lord Herschell, in commenting upon that passage, said that he thought the construction there laid down was too narrow, and he gave an instance where a vessel, though having steerage way, yet owing to some disablement answered her helm so slowly that should occasion arise she could not get out of the way in the manner which another vessel would have reason to anticipate, might be a case which would fall within the rule; and he gave another example where, owing to the breakdown of machinery, the vessel was no longer capable of being propelled and it seemed probable that she might entirely cease to be capable of being propelled at any moment. He said that might be a case which might well, if the circumstances justified it, fall within the rule.

It seems to me, speaking broadly, that in considering whether a vessel can properly be considered as coming within this article it is necessary to consider, not only the safety of the vessel herself, but the safety of any other vessel which may be approaching, and although the vessel may possibly still be able to move forward or move astern, or may still be able to answer her helm, yet her condition may be such that she cannot take the ordinary and prompt action which a vessel of her type might reasonably be expected to take. Without laying down any rule, because it appears to me that each case must depend upon its own circumstances, and in every case it must be a matter of degree, yet I think that under the circumstances I have indicated it may well be that a vessel may be regarded as not under command, and ought properly in the interests of those navigating the sea to be considered not under command, although as I have said, she may be capable of going ahead or astern, or answering her helm. I consider therefore that every case must depend upon its own circumstances,

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and in every case, assuming there is what a lawyer would consider any evidence on the point, it seems to me that the answer to the question whether a vessel is, or is not, under control must be largely, if not entirely, a matter of seamanship.

In this case I have no hesitation in saying as a lawyer that there is ample evidence that the *Drake* was not under control. She had been torpedoed; she had been holed; two of her engine rooms were flooded; she was in imminent danger of her bulkhead giving way; and, as a result, she could not be navigated at more than a very moderate speed, those in charge of her think from five to six knots; Roche J. was of opinion that she actually went seven knots. It may be she was going faster than those on board her either appreciated or thought would be justified. Her steam steering gear had been rendered useless, the means of communication with the engine room had been seriously interfered with, and although her engines would work either ahead or astern, and although it was possible to steer the ship by an elaborate arrangement of placing men to communicate one with the other in order to give directions to the man at the hand steering gear, which was below the water line, yet I think there is abundant evidence that this vessel was at the material time not under command.

[His Lordship dealt with the evidence on this point and continued:] Speaking for myself, I need only say that it seems to me that this evidence is amply sufficient to justify a finding that the *Drake* was not under control, and I should so find on such knowledge as I have, small as it is, in regard to such matters; but we have asked those who advise us this question: Having regard to the injuries to the *Drake*, particularly the difficulty of communicating an order to the man at the wheel as described by the defendant's witnesses, do you consider that the hoisting of the "out of command" signal was justified? The answer is "Yes," and with that, as I have said, I entirely agree. It is not necessary that I should add anything more upon the question raised by counsel for the appellants as to whether the *Drake* was or was not under command within the meaning of the article. He sought to draw a distinction between a case where a vessel was not in

fact under command and a case where those in charge of her were justified in considering that she was not under command, but personally, I cannot see any real distinction. If this Court, or any other Court, was of opinion that the vessel was not in such a condition as to be properly described as not under command, it would not come to the conclusion that those on board were justified in considering that she was in that condition. The Court comes to the conclusion as to whether the officers were justified, upon the opinion that they themselves formed as to the actual condition of the vessel.

The next point raised on behalf of the appellants upon the construction of this regulation is an important one, but I cannot agree with the contention put forward. All that the article provides is that where the lights and shapes required by the article are exhibited, they must be taken by other vessels as a signal that the ship showing them is not under command and cannot therefore get out of the way. Of course it follows that if the vessel cannot get out of the way, the other vessel must keep out of her way, and it follows that in the case of vessels on crossing courses, as these vessels were, the one which but for the exhibition of the signal would be the stand-on ship is converted into the keep-out-of-the-way ship. But is the reverse true that the keep-out-of-the-way ship is necessarily converted into the stand-on ship in the sense that she must keep her course and speed? I cannot think that that is the construction of the regulation, and for this reason: a disabled vessel which is exhibiting the "not under command" signal may be so disabled that it is impossible for her to keep any course or any speed, and I do not agree with the suggestion that Sir Gorell Barnes in *The Hawthornbank* (1) was laying down any general rule of construction. I think he was merely expressing his opinion as to what should be the course of that particular vessel in that particular case; and although I entirely agree that the rule he laid down in regard to that vessel may apply to a large number of vessels exhibiting this signal, it is not true to say that it is a rule of law applicable to all such cases. What the learned President

(1) [1904] P. 120, 130.

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said in that case, speaking of the *Hawthornbank*, was that some time before the collision actually happened she ported her helm. He continued: "The Elder Brethren take the view, and I agree, that that was a material cause in bringing about this collision. The helm was ported, the vessel paid off, and I think but for that having taken place there was a great probability that the plaintiffs' ship would have got across the bows of the barque. My view, therefore, is that, having signalled that she was not under command and that the other vessel must act for her, she ought not to have acted in the way she did, but should have kept her course and let the brigantine get out of the way." That, of course, is a statement of the President's view in reference to the facts of that case, which was a case in which it was possible for the vessel exhibiting the signal to keep her course, and in which apparently she deliberately altered her course in such a way as to materially contribute to the collision.

Having dealt with these two matters of law raised by counsel for the appellants, I will now deal as shortly as I can with the facts of the case.

The *Drake* was torpedoed about nine o'clock in the morning about five miles off Altacarry Head, forming the north-easterly point of Rathlin Island. She had been in charge of a convoy, of which the *Mendip Range* had formed one. The convoy had dispersed some time earlier, and the *Drake* was proceeding in a southerly direction when she was torpedoed. She was injured in the way which I have indicated, and her captain had to decide what he should do. He first thought that he could get her into Belfast, but after consulting with the engineer he came to the conclusion that that would not be a safe thing to attempt, and he therefore changed his mind and decided, if he could, to bring the vessel into Church Bay, and there await the arrival of salvage tugs. In order to do that, he turned the ship round, and proceeded on a southerly course, following the land until he got off Rue Point. At that time the *Mendip Range* was coming in an easterly direction through Rathlin Sound; she was making about ten knots an hour, and with the tide, I think it would be about thirteen knots

an hour, over the ground. It is a matter of dispute as to the speed at which the *Drake* was proceeding, but as I have said, the learned judge puts it at about seven knots. The vessels first sighted each other when they were distant about three miles apart, and there is no material dispute between the parties as to their relative positions at that time. The *Mendip Range's* evidence is that she saw the *Drake* about three miles away three points on her port bow. The *Drake's* evidence is that she saw the *Mendip Range* three to four miles away about six points on her starboard bow. That would make the *Mendip Range* heading about south-east and the *Drake* south-west. The vessels were therefore upon crossing courses. It is at that stage, or very shortly after, that they first sighted each other. That is where the really important point of difference between the two stories occurs.

The master of the *Mendip Range* said that when he first sighted the *Drake* he did not realize that she was flying the "not under command" signal, and he did not do so until she approached practically within a mile; when he did realise it he took counsel with one of his other officers as to what was the proper and prudent course to take, and they came to the conclusion, having regard to the way in which the *Drake* was heading, that it would not be safe to attempt to pass across her bows, and he thereupon decided to pass astern of her, and for that purpose he starboarded his helm. He says—and this is the important point—that after he had starboarded his helm for an appreciable time, that is to say, as he describes it for two or three minutes, the *Drake* continued on her southward and westward course, and there was no alteration from the course which he had originally seen she was following. He says that after two or three minutes had elapsed, the *Drake* suddenly ported and continued to port, with a result that within a very short space of time she rammed the *Mendip Range* on her starboard side. He says that before the *Drake* changed her course under a port helm the vessels were for a time starboard to starboard. There is no question if that was so that the *Drake* would be in the wrong. It is not the case of the *Drake* keeping her course and speed, or anything of the

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kind. It is not the case of a disabled vessel unable to control herself. If this case is correct it is a deliberate change of course, the disabled vessel putting herself under a port helm and continuing under that port helm with sufficient speed to render a collision between the two vessels inevitable, and so bringing about this serious damage. It is not necessary to discuss the construction of the rule if those are the facts.

But the *Drake's* witnesses dispute that position altogether. They say it is not the case that they altered their course in the sense that they ported their helm for the first time after the *Mendip Range* had starboarded; it is not the case that they continued on a south-westerly course for two or three minutes after the *Mendip Range* had starboarded; it is not the case that the vessels were ever starboard to starboard. They say that the real facts were that they were and had been for practically ever since the *Mendip Range* first sighted them and they first sighted her, under a port helm. They say that it is quite true that the *Drake* was not steering or answering her helm in the way she would have done if she had been an uninjured vessel; she required much more helm than she otherwise would have done, and she yawed about and they could not keep her upon her course, but that was not their fault; they had given her a port helm; they had given orders for twenty degrees port helm as soon as, or before, they sighted the *Mendip Range*, and they continued on under port helm; they gave no other order, and if the vessel sheered off rapidly at the last it was because of her disabled condition, and not because there was any alteration of the helm.

Those were the two stories with which the learned judge had got to deal, and, speaking for myself, I think if the plaintiffs' story had been accepted, there is no question as to the liability of the *Drake*. On the other hand, I think that if the *Drake's* story is in substance accepted the judge was right in holding that so far as the *Drake* was concerned it was a case of inevitable accident, and the *Drake* was not to blame for the collision. Having regard to the learned judge's judgment I think it is material to notice that although there was no counterclaim, there was, in answer to the claim of the

Mendip Range, an allegation on the part of the *Drake* that those on board the *Mendip Range* were negligent. Therefore the learned judge had to deal not only with the conduct of those in charge of the *Drake*, but the conduct of those in charge of the *Mendip Range*. I think a good deal of the language which the learned judge used is in reference to what I may call the double issue, the question of whether the *Mendip Range* was to blame, and the question whether the *Drake* was to blame. So far as the *Mendip Range* was concerned, it was of course very material to consider whether, assuming that the *Drake* was under a port helm, she was under a port helm the result of which was visible and ought to have been appreciated by those on board the *Mendip Range;* because if her master, at the time he gave the order to starboard, ought to have realised that the *Drake* was under a port helm, then he could not have been acquitted of negligence. That was one of the issues with which the learned judge had to deal, and he came to the conclusion, and in that conclusion I quite agree, that the action of the *Drake* under her port helm was not so appreciable as to throw any blame upon the master of the *Mendip Range* for not realizing, when he gave the order to starboard, that he was starboarding to a vessel then already committed to a port helm. So much for the allegations against the *Mendip Range*.

But in spite of the fact that the *Mendip Range* is absolved from blame, it by no means follows that the *Drake* is to blame, because the *Drake* would not be to blame unless the evidence established that, after the *Mendip Range* had committed herself to a starboard helm, she committed herself to a port helm. The learned judge has, I think, in some of the passages of his judgment, dealt with these two issues together, instead of keeping them quite separate and distinct, and I think possibly that that accounts for the way in which he has expressed his opinion upon one or two matters. Personally, I am quite satisfied with the evidence of Captain Radcliffe, and also I think with that of the navigating lieutenant.

[His Lordship dealt with the evidence of these and other witnesses, which he said showed that the *Drake* was committed

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to a port helm before the *Mendip Range* committed herself to a starboard helm. His Lordship continued :] Counsel for the respondents pointed out one matter which I think is important in reference to the captain's evidence, and that is that the steam whistle having been rendered useless he attempted to give the signal that he was under a port helm by means of his fog horn at the time when the vessels were possibly some three miles apart. That, of course, is quite inconsistent with the vessel being on a south-west course, and on a south-west course under either a starboard helm or no helm at all. The learned judge dealt with this matter as follows : When speaking of the course of the *Drake* after she had turned round, he says : " She proceeded so to do, for that purpose turning round first under starboard helm, so as to get into position, and was then navigated under what may be described generally as port helm." And later he says : " Certainly when some witnesses come and speak of the *Drake* having been under port helm for three-quarters of an hour, the only explanation of that can be that it is quite true that for a very substantial period she had been discontinuously and at intervals acting under port helm to make a course towards the south part of Rathlin Island, which she desired to make." The learned judge seems there to say : " Well, she was committed to a port helm, but she was acting discontinuously and at intervals under a port helm." If he means by that to describe the action of the vessel herself, that is one thing ; but if he means to indicate that varying orders were given to the helm, with great submission to the learned judge I do not think that the evidence really justifies it. Then he goes on : " and that may explain the exaggeration of time which is given as the period for which she was under port helm continuously before the collision "—I think he is there speaking, not of the evidence of the captain and the navigating lieutenant so much as the evidence of the lieutenant-commander. Then he says : " But I am satisfied that the *Drake* was not under effective port helm for anything like ten minutes before this collision." Stress is laid on the word " effective," and I think that the learned judge was laying

stress on it for the purpose of vindicating the *Mendip Range* rather than of indicating his view as to the action of the *Drake*. Then in another passage he says : " It is obvious that a good deal, and, as I find, the greater part of the alteration of the *Drake* occurred at quite a late stage, as I am advised that it is a nautical probability, and I find as a fact, that although the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered under starboard helm, its effect was not such as to become apparent to those on board of the *Mendip Range*." He is there clearly dealing with both issues together. He is acquitting the *Mendip Range* because he says the course of the *Drake* was not apparent. But according to my view he is also acquitting the *Drake* when he says that the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered under starboard helm. Again, in a further passage he says : " As to that, of course, much, if not everything, depends upon what one finds was done ; and I have already found, and repeat the finding, that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range*, and I am satisfied that port helm action was taken, not for the *Mendip Range* but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shoal water." The general conclusion which I draw from the learned judge's judgment is that he intended to decide and did decide this very material question as to whether the *Drake* took port helm action after the *Mendip Range* had starboarded ; he intended to decide that in favour of the *Drake*. It is suggested no doubt that the *Drake* turned more rapidly under her port helm at the last than she had done at an earlier stage, but I do not think that the learned Judge intended to find, and personally I do not think he would have been justified in finding, that there was an alteration of helm, in the sense that anyone in charge of the *Drake* gave any fresh helm orders.

That is the conclusion at which I have arrived upon this evidence, and in my opinion the view taken by the learned judge was right. I think that the *Mendip Range* cannot be

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charged with having in any way contributed to the accident, and I also think that those in charge of the *Drake* were not negligent and were not to blame. The case is one, in so far as she is concerned, of inevitable accident. I think the judgment of the learned judge below was right, and the appeal must be dismissed with costs.

SCRUTTON L.J. This is a case of some little difficulty, but after considering carefully the arguments addressed to us and the facts of the case, I am not satisfied that the judgment of the learned judge below was wrong: indeed, I am inclined to think it was right.

I only deliver a separate judgment because there are two points of some general importance in connection with the construction of art. 4. We are freed from one difficulty that the learned Judge below was faced with. As is usual in the Admiralty Court, the witnesses for each party thought that their interests were served by presenting a view of the facts which made them an entirely blameless ship pursuing a perfectly regular course, and the other ship one which acted with a degree of insanity that it is difficult to assume in any ship commanded by an officer of His Majesty's Navy. And so the witnesses for the *Mendip Range* came and said that the *Drake*, having hoisted her signal to show that she could not control herself, waited until the *Mendip Range* had taken the proper course to get out of the way, and had distinctly and obviously starboarded; that the *Drake* then showed that she could control herself by porting deliberately into the *Mendip Range*. Not to be outdone, the witnesses for the *Drake* said that being obviously under a port helm with two black balls flying, the *Mendip Range* took the proper course of keeping clear of the *Drake*, then crossed ahead of her, and came back and starboarded into her. As the learned judge has found, both cases were obviously wild exaggerations. The truth lay somewhere between them, and the truth was probably, according to the learned judge, that each ship acted at practically the same time, and at so short a time before the

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collision that neither could correct their action when the one observed what the other was doing.

The first point that arises of general importance is whether the *Drake* was entitled to hoist the two black balls, a signal to be taken by other vessels as an indication that the vessel showing them is not under command and cannot therefore get out of the way. Art. 15 (*e*) which deals with similar signals in fog, uses language which is different but which must be intended to mean the same thing; it speaks of "a vessel under way which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules." I take it, therefore, that either the signal under art. 4 or the signal under art. 15 is in effect a notice to the other ship that because of an accident she cannot be relied on to do what would be expected in the case of an ordinary ship because of either her present condition or of the extreme probability of something resulting from an accident in the near future; consequently, that the other ship must keep out of her way and not rely on her complying with the rules. It further seems to me that the rule does not mean that the vessel must be absolutely helpless, she must be in such a condition that her means of directing her course by steam and helm are not reliable, and not what would be expected from an ordinary ship, and that when a ship is in that condition she is justified in warning other ships that she cannot be relied on to do what ordinary ships would do, and that they must keep out of her way. Of course, she cannot make that condition simply by hoisting the black balls; she must show facts which reasonably afford some ground for her taking that view. We have asked those who advise us, it being a matter largely of nautical skill, whether they consider on the facts of this case that the *Drake* was in that condition, and they replied that she was; and so far as it is matter for me on the admitted evidence, I entirely agree. The *Drake* had been torpedoed; she had a list to starboard; two of her engine rooms out of four were out of action, one full of water, the other through the breaking of the connections; the bulkheads were leaking, and if they gave way a very serious

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state of things would exist. She had only half her engine power; she could not go at anything like full speed because of starting her bulkheads; her steam steering gear was disabled; she was only able to steer through orders transmitted by a line of persons passing them down by word of mouth to the steering gear, which was situated right aft and under the waterline. Her steam siren was disabled so that she could not give steam signals, and she was under the urgent necessity of getting as soon as she could to a particular bay where she might anchor in shallow water, and where there might be a possibility of salving her. These matters afford ample materials for the finding of fact that she was out of command. We are advised that she was out of command within the meaning of the rules, and I agree with this advice. That is the first point of general importance that arises.

The second is this. When a ship is out of command in this way, what is the effect on her obligations to other ships, and what are the obligations of other ships to her? The first effect obviously is that, whereas before that condition existed, in certain states of facts she had to keep out of the way of other ships which kept their course and speed, the signal puts the burden of keeping out of her way on the other ships. But what burden does it put on her? I do not think the burden can be to do nothing. She may be in a sinking condition, just able to struggle to a neighbouring port or bay. She may be able—though inefficiently and not very reliably—to do something which will save her. She must be entitled to do that in spite of having hoisted the "not under command" signal. It cannot be that she is to do what is called keep her course. Her course may be a thing that will lead her to danger instead of leading her to safety. She is entitled to do whatever is the proper thing to do under the peculiar circumstances of danger she is in, and she cannot in my view be under any obligation to keep the course she was on previously to hoisting the signal. She is not put in the position of the stand-on ship, which has to keep her course and speed, and I do not understand Lord Gorell, in *The Hawthornbank* (1)

(1) [1904] P. 120, 130.

to have said anything suggesting that she was in that position What I understand Lord Gorell to have meant is that in the particular circumstances of that case, where a ship had said that she was not under command and there was no urgent necessity for her doing anything, because she had a tug just waiting to pick her up, she should not then take a definite and precise course of action for which there was no immediate justification. So far as one can be sure of anything I am sure if that particular ship had been in such a condition that she could only have saved herself by porting to get to a shallow bay, Lord Gorell would not have said that she was in any way departing from any obligation imposed on her through having hoisted the "out of command" signal. The "out of command" signal is an indication to the other vessel that she must not rely on the vessel exhibiting the signal taking the action of an ordinary vessel, and that some accident has happened to her which may render it necessary for her to do something which the other vessel would not anticipate. In my view, a ship which has hoisted that signal could take a step of this sort. She must not mislead by first taking a perfectly plain and precise course of action, and then suddenly do something else without any justification. But to take a course of action to save herself is not in any way departing from her obligation, because thereby she does not keep her previous course.

If those are the two sets of principles, what has happened in this case? The judge has found that the *Drake*, before the *Mendip Range* altered her course, and when the *Drake* hoisted her two black balls, had committed herself to a port helm, an action not taken for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shallow water. That is to say, being damaged, she was taking the course necessary to save herself from further injury. That, in my view, was a perfectly proper course for the ship to take, even though she had hoisted two black balls and her means of saving herself were unreliable. So far as one can see, the evidence amply justifies that finding of the judge. If one looks at the chart,

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and sees where the *Drake* was torpedoed, and the course she was proposing to make, and looks also at the course of the *Mendip Range* heading towards Fair Head and sees the place where the *Mendip Range* must have been when she saw the *Drake* clear of Rue Point, about three miles off, it seems to me an irresistible conclusion that the *Drake*, seen at this place, and being known to be going to Church Bay, must have been then under port helm. It was the only thing she could be doing reasonably to carry out her very proper plan of getting into Church Bay to try and save herself. If so, it is not a case where the *Drake* has, after the *Mendip Range* has committed herself to a course of action, taken an unnecessary course which led to the collision. The *Drake* was carrying out the course necessary to save herself, and the *Mendip Range* misunderstood it.

I agree with the finding that under the peculiar circumstances the *Mendip Range* was not to blame, but I also agree with the judge's finding that the *Drake* was entitled to hoist the two black balls showing she was out of command, and was entitled to continue the course which she was on before the *Mendip Range* acted in the way she did, to save herself; she was unable to avoid the collision, not through negligence, but because there was no step that she could have properly taken in the short time that elapsed after each vessel realized what the other was doing.

For these reasons, which I have only expressed separately because of the two points about the "out of command" signal and the duty of ships which hoist these signals, I agree with the judgment that has been delivered.

EVE J. I agree with all that has been said as to the construction of art. 4, and as to its application in the circumstances of this case. On the facts, I only desire to add this, that if the questions raised on the evidence had come before me as a judge of first instance, I am not prepared to affirm that I should have answered them in the same manner as the learned judge below has done. The conclusions, however, which are sought to be set aside rest largely upon probabilities,

and this much I can say, that having done my best to weigh all the probabilities of the case, I am unable to resist the impression that whatever my own leaning may be, the learned judge's decision is as likely to be right as a finding the other way.

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In these circumstances I agree in the order dismissing the appeal.

Appeal dismissed.

Solicitors for the appellants : *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitor for the respondent : *The Treasury Solicitor.*

E. C. T.

[IN THE COURT OF APPEAL.]

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[1918 fol. 966.]

Admiralty—Collision—Vessels on crossing Courses—"Give-way" Vessel acting too late—"Keep course and speed" Rule—Regulations for Preventing Collisions at Sea, arts. 19 *and* 21.

Two steam vessels were approaching each other on crossing courses at a joint speed of twenty knots, there being a difference of 17 degrees off the opposite courses. The *K.*, having the *O.* on her starboard bow and required therefore, under art. 19, to keep out of the way, and, under art. 22, to avoid crossing ahead if the circumstances permitted, took no steps to get out of the way and narrowed on to the port bow of the *O.* until she was about ahead at a distance of about a quarter of a mile. Those on board the *O.*, thinking that the *K.* had allowed the time for acting to go by, and that she would keep her course and pass on to the *O.*'s starboard side, starboarded their helm to give the *K.* more room. About the same time the *K.* ported, thus bringing about a collision :—

Held, that the rule that when under any of the regulations one of two vessels has to keep out of the way the other shall keep her course and speed (art. 21) must be strictly adhered to ; and that, although there may be cases in which the keep course and speed vessel is relieved from her obligation apart from the rule which provides that she shall act where the action of the give-way vessel alone cannot avoid the collision, this was not one of those cases, and that the *O.* was to blame ; but

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(reversing the decision of Hill J.) that the *K.* was also to blame for not taking action sooner to get out of the way of the *O.*

Dictum of Lord Parker in *The Olympic and H.M.S. Hawke* [1913] P. 214, 279, as to circumstances under which the keep-course-vessel may be relieved from her obligation, considered.

APPEAL from a decision of Hill J. in an action of damage by collision.

The plaintiff was the Shipping Controller, the owner of the steamship *Konakry*; the defendants were the owners of the steamship *Orduna*.

The collision took place on the night of December 1, 1918, off the south coast of Ireland. The wind was southerly, a moderate breeze, and the weather was fine and clear.

According to the statement of claim, the *Konakry*, a screw steamship of 5742 tons gross, bound from Queenstown to Trinidad in ballast, manned by a crew of 46 hands, was on a course of S. 49° W. true, making about 6 knots, when those on board her observed at a distance of four to five miles, and bearing about 1½ points on the starboard bow, the two mast-head lights and some deck lights of the *Orduna*. The *Konakry* kept her course until the red light of the *Orduna* became visible, when the helm was ported and then steadied when the *Orduna's* red light had been brought on to the port bow. The vessels then approached in a position to pass safely port to port, but shortly afterwards the *Orduna*, without sounding any signal, opened her green light, the red still remaining visible; whereupon the helm of the *Konakry* was again ported and one short blast sounded. The *Orduna* answered with one short blast and shut in her green, but almost immediately opened it again, whereupon the helm of the *Konakry*, which was still aport, was ordered hard-a-port and one short blast again sounded. The *Orduna* replied with two short blasts, and came on at a high rate of speed with both side lights visible, and the vessels being then so close that there was no other chance of averting the collision, the engines of the *Konakry* were kept working at full speed, and the helm was put hard-a-starboard to try to throw her quarter clear. The *Orduna* was several times hailed to hard-a-port her helm, and though

she appeared to do so at the last moment, it was too late and with her stem she struck the port side of the *Konakry* about 80 feet from the stern a heavy blow, doing so much damage that the *Konakry* had to be abandoned and was lost.

The plaintiff alleged that those in charge of the *Orduna* were negligent, inter alia, in that they failed to keep their course and improperly starboarded.

According to the defence, the *Orduna*, a triple-screw steamship belonging to the Pacific Steam Navigation Company, of 15,499 tons gross, bound from New York to Liverpool with passengers and cargo, and manned by a crew of 270 hands, was on a course of N. 66 E. true, making about 14 knots, when the masthead and green lights of the *Konakry* were sighted, distant between two and three miles and bearing about a point on the port bow. The *Orduna* kept her course and speed until the *Konakry*, which continued to approach shewing her green light and shaping to cross ahead, had drawn very close and was about ahead, when the helm of the *Orduna* was ordered starboard and then hard-a-starboard, and then immediately afterwards, when the *Konakry* blew a short blast in reply to the two short blasts of the *Orduna*—which were blown when her helm was starboarded—and opened her red light, the helm of the *Orduna* was put hard-a-port, her whistle was sounded a short blast and her starboard engine was put full speed astern to assist her helm, and then her port engine was put full speed astern; but very shortly afterwards the *Konakry* with her port quarter struck the stem and port bow of the *Orduna* a heavy blow, causing her serious damage.

The defendants alleged, inter alia, that the *Konakry* failed to keep out of the way of the *Orduna*; failed to avoid crossing ahead; and, when crossing ahead, improperly ported.

At the trial, Hill J., who was assisted by two of the Elder Brethren, said that he could not accept the story of the plaintiff's witnesses. He believed that the *Konakry* stood on much longer than they had said and took action much later and when they were much nearer the *Orduna* than they admitted. He accepted the defendants' story in so far as it described the *Konakry* as standing on, and the vessels

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approaching, the red of the *Orduna* to the green of the *Konakry* until a late period. The conclusion he drew from the defendants' evidence, however, was that at the time the helm of the *Orduna* was starboarded, the green light of the *Konakry* was not on the starboard bow, it was not more than ahead, if indeed it was as much as ahead, of which his Lordship was doubtful. The further conclusion he drew was that the porting of the *Konakry* was not later and probably rather earlier than the starboarding of the *Orduna*. His Lordship continued as follows: —

"On these facts it follows that but for the starboarding of the *Orduna* the *Konakry* would have gone clear. The Elder Brethren are clearly of that opinion upon the whole facts of the case. They are also of opinion that the *Konakry* did not get into such a position as regards the *Orduna* as to justify the *Orduna* in starboarding as she did. For that starboarding the *Orduna* must be to blame. The starboarding was not done in the agony of collision. The second officer says he starboarded when the *Konakry* 'was still at a safe distance.' Whatever that means, it at any rate negatives the idea that the starboarding was in the agony of collision. The starboarding was action taken because the green light appeared to be crossing, or about to cross, the bows of the *Orduna*, and the second officer assumed that the *Konakry* was not porting or about to port. In such a position it is very difficult for the stand-on ship to justify starboarding. The ships were not passed ships—it was, at least, always possible that the *Konakry* might at the last moment port or might already have begun to port. If she did port, the starboarding would defeat that proper manœuvre; if she did not port, she would rapidly pass on to the starboard bow and the starboarding would have been unnecessary. I am advised that the starboarding was clearly wrong, and the hard-a-starboarding aggravated the fault. I am further advised and am clearly of opinion that the reversing was too late. I incline to think that if the position was such as in the view of the second officer to call for action at all on the stand-on ship, it called for reversed engines. But at least, when, immediately upon the star-

boarding, it was seen that the *Konakry* 'was closing rapidly'—according to the proof of the second officer—or was so close that the second officer feared collision—according to his deposition—it ought to have been immediately obvious that the *Konakry* was porting, and the action which would best aid to avert collision was undoubtedly not hard-a-starboard helm, but full astern on both engines. If the second officer had reversed both engines instead of hard-a-starboarding, there would even then probably have been no collision. Therefore the *Orduna* is to blame."

"There remains what to me is a question of much difficulty, and it is this. The *Konakry* did not port as soon as she might have ported, but she ported in time to have cleared the *Orduna*, but for the *Orduna's* starboarding. And it must be remembered that the ships were approaching on a fine angle—only 17 degrees off opposite courses—and a very little porting would carry the *Konakry* clear. She could therefore safely leave it to a comparatively late time. In fact she acted in such time that she altered nearly six points before the collision and she did port in time to avoid the *Orduna* if she had not been thwarted. The Elder Brethren are of opinion that the *Konakry* was in the circumstances justified in what she did, and that she acted in sufficient time; and I follow their advice and acquit the *Konakry* of blame in that respect. . . . . The result is that the *Orduna* is alone to blame."

The defendants appealed.

Bateson K.C. and *D. Stephens K.C.* for the appellants.

Aspinall K.C. and *Raeburn K.C.* for the respondent.

The arguments and the cases cited on the question whether the *Orduna* was justified in starboarding are fully stated in the judgments.

BANKES L.J. This is an appeal from a decision of Hill J., who found that of the two colliding vessels the *Orduna* was alone to blame.

The collision took place at night on December 1, 1918, off the coast of Ireland. The *Konakry* was a steamship of

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5742 tons gross and 360 feet long, in ballast. The *Orduna* was a large passenger vessel, over 15,000 tons gross, 569 feet over all, carrying cargo and passengers. It was a fine night and both vessels had their proper lights. Their conjoint speed was about 20 knots, the *Orduna* having about 14 knots and the *Konakry* about 6 knots, but the vessels were on crossing courses, there being a difference of 17 degrees off the opposite courses. The *Konakry's* course was S. 49 W. and the *Orduna's* N. 66 E.

Under these circumstances the *Orduna* was the stand-on ship and the *Konakry* the ship whose duty it was to keep out of the way. At the trial the case for the *Konakry* was that she was from the first endeavouring to keep out of the way and that she ported, ported again, and ported a third time, but was unable to keep out of the way because the *Orduna* starboarded into her. The learned judge has refused to accept the story of the *Konakry*, and he has proceeded to deal with the case upon the evidence that was forthcoming from the *Orduna*. That was not in all respects quite satisfactory evidence, because the officer who was in fact in charge of the *Orduna* at the time of the collision was not called as a witness ; it was said he was ill, and ultimately his deposition and his proof were read, and the learned judge had to deal with the case upon those materials and upon the statement of a fourth officer who was called and gave evidence.

The position of the *Konakry* was that under art. 19 it was her duty to keep out of the way ; and, under art. 22, being the vessel directed by the rules to keep out of the way, her duty was, if the circumstances of the case admitted it, to avoid crossing ahead of the other. There was no reason whatever why the *Konakry* should not have obeyed both these articles. She did neither, and for some reason she took no action, according to the learned judge's finding, until the vessels were about a quarter of a mile apart and the *Konakry* was just about ahead of the *Orduna*.

The first question that naturally arises is whether, under those circumstances, the *Konakry* was to blame for the collision either entirely or partly ; and, upon that point, the learned

judge expresses himself in this way: "The Elder Brethren are of opinion that the *Konakry* was in the circumstances justified in what she did, and that she acted in sufficient time, and I follow their advice and acquit the *Konakry* of blame in that respect." I think it is significant that the learned judge does not express his own opinion or really indicate that he is satisfied with the view which the Elder Brethren expressed. He simply says he follows their advice. Speaking for myself, if I had to decide this point without any expert assistance I should most assuredly have come to the conclusion that the *Konakry* was to blame. I cannot see any justification whatever for her standing on in the way in which she did and putting the *Orduna* in the position in which she was placed. We have taken our assessor's opinion and they do not agree with the Elder Brethren in the court below. They think the *Konakry* was to blame in not taking action sooner to get out of the way of the *Orduna*.

There comes now the very much more difficult question as to the action of those in charge of the *Orduna*. To judge of that action it is necessary to come to a decision as to the relative position of these two vessels at the time action was taken by those in charge of the *Orduna*, and I think the fair inference from the evidence is that the vessels were about a quarter of a mile apart. I do not think the distance was more than 500 yards, and I think the *Konakry* was about ahead of the *Orduna*. The learned judge states his view on that matter in this way. He says: "The conclusion I draw from all this, and especially from the deposition of the second officer, is that at the time the helm was starboarded the green light of the *Konakry* was not on the starboard bow of the *Orduna*, it was not more than ahead, if it was as much as ahead, of which I am doubtful." The evidence on that point consisted, as I have said, of the evidence of the fourth officer and the deposition and proof of the junior second officer. The fourth officer's answer, in reply to the question as to what the *Konakry* did, was: "She narrowed on the port bow until she came right ahead, and finally she got a little on the starboard bow." When he speaks of "finally" I do not understand him to say that was her

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position before action was taken on the *Orduna*; I think he was indicating the position at which she was at a time when acting under her port helm she must have got, as counsel for the *Orduna* has pointed out, to some extent on the starboard bow of the *Orduna*. That is not the material time. The material time is when the order was given by the second officer of the *Orduna* to starboard.

The case of the second officer is that he did not consider the position one in which there was risk of collision; he acted not in the agony of collision and not in the first instance to avoid a collision, but because he considered that he was justified in assuming that the *Konakry*, which was breaking and had broken the regulations, was continuing on her course and would not alter so as to avoid risk of collision; she was not fully clear, and she was still a crossing vessel; and partly by failing up to that time to get out of the way and partly because when she was so nearly across she had failed to give any indication by a signal that she was about to take action under her port helm, he assumed that he was justified in considering it was not a case of a risk of collision at all, but was a case in which he was justified in considering she would continue her course without taking action and that he therefore was entitled to starboard his helm in order to give the vessel a wider berth. That is what I understand to be his case as indicated in his proof and his deposition. He says in his proof: "When the *Konakry* was about a quarter of a point on the starboard bow and distant about a quarter of a mile off, I ordered the helm to be starboarded ten degrees, and immediately afterwards, as the ships were closing rapidly, I ordered hard-a-starboard and I myself blew the whistle two short blasts. My reason for giving the order to starboard was that it was clear the other ship was passing on to my starboard side and I starboarded to give her a wider clearance." Then further on he says: "When I gave the order to starboard I did not consider there was risk of collision." In his deposition he rather alters the language, but I do not think he intends to alter the effect of what he said: "When the green light was almost right ahead and still at a safe distance deponent sent

the extra fourth officer to the wheel-house to order the helm ten degrees to starboard, and, when the extra fourth officer returned, the green light was about one quarter point on the starboard bow and getting so close that the deponent feared a collision. Deponent immediately ordered the helm hard-a-starboard "—that is the second action which I will deal with presently.

We have had an interesting discussion as to the effect of the regulations upon a person who finds himself in the position in which this second officer said he found himself. I have pointed out it does not seem to me to be a case where two vessels are crossing involving risk of collision, because the second officer's case is there was no risk of collision. He does not suggest that his action was justified because it was action taken in the agony of collision; nor does he suggest that it was justified because, under the regulations, the other vessel was not able, by her own action, to avoid the collision. The contention is that his is one of those possible cases indicated by Lord Parker of Waddington in *The Olympic and H.M.S. Hawke* (1), where Lord Parker says: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger." I think possibly that that expression of opinion may at some time have to be considered. Lord Parker continues: "If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed." This second officer's case is that the *Konakry* had allowed the time for acting to go by, and he was, under those circumstances, justified in taking the course he did. I think there may be such cases, but I agree entirely with what counsel for the respondent said as to the importance of adhering strictly to the regulations. I think such a case ought to be scrutinised with the very greatest care. A somewhat similar case was suggested to exist in *The Norman Monarch* (2), and no one of the members of the House of Lords accepted the proposition

(1) [1913] P. 214, 279. (2) (1918) Lloyd's List, Dec. 10.

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that the other vessel in that case, the *Phrygia*, was in such a position. The Lord Chancellor, it is quite true, suggested that if the *Norman Monarch* had been exactly ahead of the *Phrygia* she might possibly have been justified in starboarding her helm having regard to the fact that the *Norman Monarch* had given no indication she was about to port; but he only suggested it was a possibility, and the view of Lord Phillimore suggests that it would be dangerous to accept the position, as he expresses it, that the officer of the *Phrygia* thought that the *Norman Monarch* would draw ahead in a few seconds. I think that a person who desires to bring his case within the exception to which I have referred must make it abundantly plain that he comes within the exception and that he was justified in taking up the exceptional position to which Lord Parker refers in *The Olympic and H.M.S. Hawke.* (1) It is largely a question of seamanship, and we have put a question to those who advise us upon this particular point, and, inasmuch as the House of Lords has suggested it would be an assistance if the questions were recorded, I will read the questions we suggested and the answers which were given. The questions are these: "Assume the courses of the two vessels to have been crossing courses, the *Konakry* S. 49 W., the *Orduna* N. 66 E., the joint speed twenty knots, and that the vessels approached each other and were about a quarter of a mile apart with the *Konakry* about ahead of the *Orduna* before either vessel took action for the other, do you consider there was a want of care and skill and proper seamanship (*a*) On the part of those in charge of the *Konakry* in not taking action sooner to keep out of the way of the *Orduna*?" The answer is "Yes, she should have ported sooner." Then "(*b*) On the part of those in charge of the *Orduna* (1.) In starboarding, assuming that the order to starboard was given at practically the same time as the *Konakry* gave the port action signal?" The answer is "Yes." Then "(2.) In hard-a-starboarding and not reversing?" The answer is "Yes." "Would the starboarding of the helm of the *Orduna* followed by her porting in the way described by the second officer alter her course laterally

(1) [1913] P. 214, 279.

so as to bring her"—to use the learned judge's language—'nearer the line of the *Konakry's* advance?' The answer is "Yes." I accept and agree with the view of those who advise us with regard to the action of the *Orduna*. It seems to me that the second officer's action was that of a man who, having regard to the regulations, was unduly cautious, if I may use that expression. There was no real necessity for him to take action at the time, and, although one sympathises with a person in that position and the responsibility which rested upon him, yet he must take the consequences if the fact be that he acted before he was justified in so acting.

The next question is whether the default of these two vessels, as I have indicated it, materially contributed to the collision, and, upon that question, we have had advice. Counsel for the appellants argued that the Court should come to the conclusion that the learned judge was wrong in the conclusion that the helm action of the *Orduna* brought her nearer the line of the *Konakry's* advance. That is a matter upon which I personally am not in a position to express any confident opinion, but we have put the question expressly to those who advise us, and they take the same view as the learned judge and those who advised him about the action of the *Orduna* in her starboarding and not reversing. In face of those opinions, I think it is plain that the action of the *Orduna* did contribute to the collision, and we are so advised. We also asked a question and we have been advised that the action of the *Konakry* contributed to the collision. It is easy to say that one was more to blame than the other, but I do not think the Court ought to attempt to apportion blame unless there is some clear indication of the extent to which the one was more blameworthy than the other. I do not think we can come to any such conclusion in the present case. Each contributed, and each materially contributed, to the collision, and, in my opinion, the proper conclusion is that both vessels should be held equally to blame for this collision. The appeal will be accordingly allowed to that extent.

SCRUTTON L.J. I am not sure that if I had been trying this

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case without assessors my judgment would have been in all respects the same as the one with which I am concurring, and it is fair to the parties that they should know the state of my mind after listening to the arguments we have heard in a case of some difficulty and importance.

There are three rules concerned when two steam vessels are crossing so as to involve the risk of collision; the vessel which has the other on her own starboard side should keep out of the way; where one of two vessels is to keep out of the way, the other should keep her course and speed; and every vessel which is directed by the rules to keep out of the way of another vessel should, if the circumstances admit, avoid crossing ahead of the other. I entirely agree and wish to emphasise, if it were necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is a difficult one. It has been thought right to tell one of the ships to keep her course and speed and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen. If the stand-on ship acts too soon she may easily put the give-way ship in a great difficulty; and, hard as it is, she ought to keep her course and speed until the last possible moment. I entirely agree as to that.

The *Konakry* was the give-way ship. She ought to have passed under the stern of the *Orduna* and kept out of her way. It is a little difficult to be sure exactly what she did, because her witnesses have been disbelieved, and she comes before the Court with a story which the Court has found to be inaccurate, and adopted no doubt to put the best face she could on her proceedings. Her case is that she saw the *Orduna* a point and a half on her starboard bow. She says she kept on porting and the Court disbelieved her. What she did apparently was to keep on as if she were going to cross the bows of the *Orduna*—breaking art. 22, and without giving any whistle signal—until she was either ahead, or very nearly ahead, of the *Orduna*, and at a time when the two vessels were within half a mile of each other. It seems to me that up to that time

she was acting as if she were going to break the rules, acting in a way which put great embarrassment on the stand-on ship, and in a way in which, if a collision followed from her action in apparently breaking the rules, it would be impossible for her to escape blame. Our assessors have advised us that she was guilty of lack of seamanlike care in taking that course and that it contributed to the collision. I entirely agree, and should have come to the same conclusion myself, and I suspect from the language of the learned judge's judgment that he would have come to the same conclusion but for the advice of his assessors. So much for the *Konakry*.

I have found considerably more difficulty in dealing with the case of the *Orduna*. The rules put a duty on the *Orduna* if the ships are crossing so as to involve risk of collision. Suppose the give-way ship is not manœuvring to pass under the stern and has got right ahead of the stand-on ship in a position in which if she keeps her course there will be no collision, I have great difficulty in seeing under those circumstances that there is a crossing so as to involve a risk of collision; and, if there is no crossing so as to involve a risk of collision, it may be said that the stand-on ship no longer has the duty of standing-on and will not be wrong if she starboards, because there is no crossing so as to involve risk of collision. At the same time, I quite appreciate that if the courses are crossing but the ships have not yet crossed, and if, though the give-way ship has not yet acted, she can act and pass under the stern by her own action alone, the stand-on ship is in the position in which she ought to stand on. It is very difficult to say where one position passes into the other, and personally it strikes me as very hard to find the stand-on ship to blame, because when the other ship is apparently going to break the rules the stand-on ship does not appreciate rightly the exact moment at which she is free to act. I have felt very great difficulty as to the position of the *Orduna*. There is, however, this undoubted fact, as I read the evidence: if the *Orduna* had merely kept her course and speed, the *Konakry* would have gone clear by her porting, though in rather a startling way, a way calculated to disturb any navigator on the *Orduna*

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when he saw what the *Konakry* was doing. Again, if the *Konakry* had done what she appeared to be going to do, break the rule and cross ahead and keep her course, she would have gone clear without there being any necessity for the *Orduna* doing anything ; and if the *Orduna* had merely reversed and not starboarded, again the collision would not have happened. Those being the facts, when four nautical assessors advise the Court, two below and two here, that they think the *Orduna* was guilty of lack of seamanlike skill in starboarding under the circumstances put to them, I do not feel confident enough in my own judgment to go contrary to their opinion. I appreciate and am impressed by the great importance of maintaining the stand-on rule, and that influences me in not acting upon the opinion I might otherwise have formed. I am also impressed by the fact that in *The Norman Monarch* (1), where a very similar problem was presented, I think all the members of the House of Lords who delivered judgments came to the conclusion that the fact that the vessel was apparently going to cross ahead was not a justification for the stand-on vessel departing from this rule. It is quite true, and I wish to state it, that the *Norman Monarch* case is a little complicated by the fact that the case of the *Phrygia* was not "You were a steam vessel crossing ahead and apparently would have gone right ahead, and I am relieved from my obligation." The case of the *Phrygia* was : "You looked like a sailing vessel because you were not showing your masthead light, and for a sailing vessel I was justified in starboarding under your stern." The *Phrygia* started with this enormous initial difficulty. The Court was advised that it was gross neglect, with the vessel acting in the way the *Norman Monarch* was, to take her for a sailing ship in the existing state of the wind ; but even giving full weight to the difference in the facts, I think the judgments, particularly that of Lord Phillimore, are in accordance with the view which would be arrived at in this case if we found the vessels both to blame. While, for the reasons I have stated, I feel considerable doubt in this case, I do not feel justified in dissenting, and

(1) Lloyd's List, Dec. 10, 1918.

I feel bound to concur in the judgment which has been delivered. Once both vessels are found to blame, I do not see any materials in this case for departing from the old rule.

EVE J. I agree. I do not think the appellants have established that the *Konakry* was on their starboard bow when she ported. The finding of the Court below that she was not more than ahead when the helm of the *Orduna* was starboarded was I think the inevitable inference from the deposition of the navigating officer of the *Orduna*. In these circumstances, with the vessels in these relative positions, at less than half a mile apart, the question resolves itself into this: Was the second officer of the *Orduna* justified in concluding that the *Konakry* was intending to pass to starboard and had no intention of porting? If he was so justified, his starboarding was justifiable and indeed a praiseworthy course, because it was calculated to secure more sea room for the passing vessels. If, on the other hand, he was not so justified, he was acting contrary to the rules; and, if his so acting contributed to the collision, it is impossible to hold his vessel free from blame. I agree entirely with what fell from the learned President as to the burden imposed on those who seek to establish a case justifying a departure by the stand-on vessel from the rule. In my opinion, on the whole of the evidence in this case, it is impossible to come to the conclusion that the appellants have discharged the onus of justifying the departure from the rule. We have been advised that the *Konakry* was not navigated with skilful seamanship in that she delayed too long the port action. We have also been advised that the starboarding and the hard-a-starboarding on the part of the *Orduna* was unseamanlike and that they contributed to the collision. In these circumstances, when we are finally advised that the seamanship, or the defective seamanship, on both vessels contributed to the collision, it seems to me the only conclusion at which we can arrive is that both vessels were to blame, and that, in the circumstances, we are not here able to do more than to apportion the blame equally between them.

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For these reasons, I think the appeal must be allowed to the extent which the learned President has stated.

Appeal allowed to the extent of finding both vessels equally to blame. No costs either in the Court of Appeal or in the Admiralty Court.

Solicitors for the appellants: *Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitor for the respondent: *The Treasury Solicitor.*

E. C. T.

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